Supreme Court, U.S.
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No. 99-

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM H. THAYER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a prosecution under 26 U.S.C. § 7202:

a. Is the offense established if the defendant collected and accounted for but failed to pay over the taxes withheld from employees of the corporation of which he was president (as held by the Second and Third Circuits), or must the government prove that the defendant failed both to account for and to pay over the taxes that have been collected by withholding (as interpreted by the Ninth Circuit)?

b. Is the question whether the president of a corporate employer is (as set forth in 26 U.S.C. § 7343) "under a duty" "as such officer" "to perform the act" of paying over withheld taxes one for the jury, or may this issue be decided by the court of appeals in the first instance?

2. To obtain a conviction under 18 U.S.C. § 152(1) for knowing and fraudulent concealment of assets in bankruptcy, must the government prove that the defendant, who was not the debtor but rather was president of the bankrupt corporation, had knowledge of a legal duty to disclose those assets to the creditors?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (William H. Thayer and the United States). Petitioner Thayer's wife, Josephine Thayer, was a co-defendant at trial, but she did not appeal.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WILLIAM H. THAYER respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit filed and entered on December 28, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (per Scirica, J., with McKee, J., and Brotman, D.J.) was filed December 28, 1999. The decision is published at 201 F.3d 214,[1] and is reproduced in Appendix A. The district court's unpublished memorandum (Edward N. Cahn, U.S.D.J.) denying post-trial motions is not published. It is available at 1998 WL 195940, and is reproduced as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming petitioner's convictions but vacating and remanding the sentence was filed December 28, 1999. Appendix A. The order denying petitioner Thayer's timely petition for rehearing was filed February 8, 2000. Appendix C. This petition is timely filed on or before the ninetieth day thereafter. Rules 13.1; 28 U.S.C. § 2101(c). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

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[1] It is also published unofficially at 84 AFTR 2d 99-7497 and 2000-1 USTC ¶ 50,136.

FEDERAL STATUTES INVOLVED

Section 152 of title 18, United States Code, provides, in pertinent part:

> A person who --
>
> (1) Knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;
>
> * * * *
>
> shall be fined under this title, imprisoned ... or both.

18 U.S.C. § 152.

Sections 3402-3403 of the Internal Revenue Code provide, in pertinent part:

> **§ 3402. Income tax collected at source.**
>
> **(a) Requirement of withholding. (1) In general.** Except as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary. ...
>
> **§ 3403. Liability for tax.**
>
> The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter ....

26 U.S.C. §§ 3402-3403.

Section 7202 of the Internal Revenue Code provides, in pertinent part:

> Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall ... be guilty of a felony ....

26 U.S.C. § 7202.

Section 7343 of the Internal Revenue Code provides, in pertinent part, that, as used in the criminal provisions of the Code:

> The term "person" as used in this chapter [IRC ch. 75, 26 U.S.C. §§ 7201-7344] includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

26 U.S.C. § 7343.

STATEMENT OF THE CASE

This petition presents important questions concerning the interpretation of the criminal provisions of the federal bankruptcy and tax laws, on which the circuits are divided.

a. Procedural History

Petitioner William Thayer was convicted on 20 counts of failing to pay over an employer's withholding tax, concealing bankruptcy assets, and making false IRS refund claims; on 17 other counts, he was acquitted. His sentence of 18 months' imprisonment was vacated by the court of appeals; resentencing is pending as of this filing.

A grand jury in the Eastern District of Pennsylvania indicted the petitioner on April 2, 1997, along with his wife, Josephine Thayer, on 37 counts. CA3 App. 9a. Counts One through 21 charged willful failure to pay over the employment taxes. 26 U.S.C. § 7202 and 18 U.S.C. § 2. CA3 App. 9-31a. Specifically, Counts One through Ten charged willful failure to pay taxes that had been withheld by Mobile Inmate Systems Corporation (MIS) for ten tax quarters between 1991 and 1993. Counts 11 through 21 charged the Thayers with willful failure to pay over taxes withheld by Equipment Leasors of Pennsylvania, Inc. (ELOP), for a different ten quarters from 1991 through 1994.[2]

Counts 28 through 37 charged petitioner and his wife under 18 U.S.C. §§ 152 and 2 with knowingly and fraudulently concealing assets belonging to MIS from creditors and the U.S. Trustee on ten occasions while the corporation was in bankruptcy. CA3 App. 40-59a. Specifically, these counts charged the Thayers personally with violating the duty of a Chapter 11 debtor-in-possession not to conceal its assets. Counts 28 through 30 alleged three violations of that duty in 1992; Counts 31 through 37 alleged seven violations of duty in 1993.

Trial before former Chief U.S. District Judge Edward N. Cahn and a jury commenced on January 21,

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[2] Counts 22 through 24 charged, under 26 U.S.C. § 7201 and 18 U.S.C. § 2, willful evasion of personal income taxes for 1991, 1992 and 1993. Counts 25 through 27 charged the Thayers, under 18 U.S.C. §§ 287 and 2, with willfully filing false claims for income tax refunds for each of those years. CA3 App. 32-34a. The issues raised in this petition do not directly implicate the false claims counts; petitioner was acquitted on the personal tax evasion counts.

1998, and lasted six days. The jury returned its verdict on January 30, 1998, finding the two defendants guilty under 26 U.S.C. § 7202 on Counts One, Five, 12, 15, 17, 19, and 20. The jury found the Thayers not guilty on the other fourteen counts of willful failure to pay over withheld employment taxes. The jury acquitted both Thayers of willful evasion of personal income taxes (Counts 22 through 24). But on the three counts of willfully filing a false claim for an income tax refund (Counts 25 through 37), in violation of 18 U.S.C. § 287, the defendants were convicted. Finally, both defendants were found guilty on all ten counts (Counts 28 through 37) of bankruptcy concealment, charged under 18 U.S.C. § 152(1). CA3 App. 5a (Dkt. #32).

Petitioner and his co-defendant wife filed a joint motion for judgment of acquittal or new trial. CA3 App. 157a. In a memorandum and order dated April 9, 1998 (entered April 10), the district court denied the motion. Appx. B.

Sentencing was held before Chief Judge Cahn on August 19, 1998. CA3 App. 175a. Petitioner was sentenced to a term of eighteen months in prison, followed by supervised release of three years. He was also ordered to pay restitution of $149,355 to the IRS and a special assessment of $1,000.[3] CA3 App. 212-13a.

Petitioner filed a timely Notice of Appeal. CA3 App. 7a, 221a. By order of the District Court entered March 31, 1999 (Van Antwerpen, J., in light of Judge Cahn's retirement), petitioner was granted bail pending

[3] Co-defendant Josephine Thayer received a sentence of five years' probation, and was ordered to pay restitution (jointly and severally) and a $1000 assessment. CA3 App. 217-18a. She did not appeal.

appeal. On appeal, the Third Circuit affirmed the convictions in a published opinion, but vacated the sentence and remanded for resentencing, agreeing with the petitioner that a two-level error had been made in calculating the guideline range. Appx. A. On February 8, 2000, the court of appeals denied Mr. Thayer's petition for rehearing. Appx. C. Resentencing has been postponed pending the filing of this petition.

b. Statement of Facts

Mobile Inmate Systems Corporation (MIS) manufactured and sold mobile modules to prison systems. Equipment Leasors of Pennsylvania, Inc. (ELOP), owned and operated Fleet Helicopter Services. As employers, MIS and ELOP each withheld the required federal taxes from their payrolls, but the two corporations frequently failed to pay over to the IRS amounts withheld as employment taxes from the paychecks of their employees, who numbered more or less 28 during the years in question.

From the first quarter of 1991 through the third quarter of 1993, MIS fully and accurately accounted to the IRS for withheld taxes, by filing an employer's quarterly tax return, Form 941, for each period. However, for ten of those eleven quarters, MIS failed to pay over to the IRS the amounts it withheld from employees' wages. Similarly, ELOP fully and accurately accounted to the IRS for withheld taxes from the first quarter of 1991 through the third quarter of 1994. But ELOP failed to pay over the amounts withheld from employees' wages for eleven out of fifteen quarters. Taxes withheld but not paid by MIS totaled $654,756. Taxes withheld but not paid by ELOP totaled $248,887. Petitioner William Thayer was president of both corpora-

tions and held 80% of the stock of each. His wife, Josephine Thayer, was corporate secretary and 20% owner of each corporation.

The defendants' expert witness, CPA Robert Gillespie, provided the only information about whether the corporations were able to pay 941 taxes when they came due. Gillespie based his conclusions about available funds for each corporation in their common bank account on a source and application analysis.[4] This analysis revealed ELOP to be the source of substantial funds deposited in and dispersed from the MIS account. Gillespie told the jury that ELOP's income went into the MIS account until that account was closed and its funds transferred to the ELOP account in May 1993. This included the period during which MIS was a Chapter 11 debtor in possession. As Judge Cahn noted, ruling on the Thayers' Rule 29(c) motion, "the Thayers were found guilty on these [Form 941] counts only where their expert

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[4] The trial judge wrote that, "The jury was not required to accept the Thayers' evidence that money in MIS's bank account did not necessarily belong to MIS." Appx. B11. The court of appeals agreed. Appx. A12. The only showing that there was any money in MIS's account, however, or of whence that money derived, was the analysis by Gillespie. The government's attack on Gillespie's conclusion was limited to pointing out that he had made one error -- he initially said that MIS enjoyed a positive cash balance in only one quarter out of ten, when in fact it was two -- and that the accountant had not ascertained what funds were available on the particular three days that the IRS expected the taxes to be paid, rather than on the day the bank compiled its monthly statement. The government offered no conflicting evidence as to source and application of monies in the MIS account.

witness, a certified public accountant, testified that MIS had a positive bank-account balance." Appx. B6.

In connection with MIS's 941 tax delinquency, an IRS revenue officer had met with petitioner five or six times through November 1991. She asked him for a complete financial statement on MIS, but none was provided. On October 31, 1991, MIS filed a petition under Chapter 11 of the Bankruptcy Code. At that point, the IRS stopped meeting with petitioner. MIS's Chapter 11 petition was signed by petitioner William Thayer, as authorized by the corporation. Schedules and a statement of financial affairs, also signed by petitioner, were filed on December 27, 1991. The IRS was scheduled as the largest creditor. The bankruptcy court allowed MIS to carry on its business as a debtor-in-possession.

MIS never filed an operating report with the bankruptcy court. A staff attorney from the office of United States Trustee testified that monthly operating reports "are required to be submitted by all Chapter 11 debtors in possession while they're in bankruptcy."[5] Through such reports, a debtor informs the court and creditors of all disbursements. As to whether petitioner himself had the duty to file these operating reports -- and as to whether either petitioner or the debtor MIS was informed of a debtor's obligation to file such reports -- there was no testimony at all, however. The witness from

[5] See 11 U.S.C. §§ 704(8) (if debtor's business continues, chapter 7 trustee must file "periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements"), 1106(a)(1) (chapter 11 trustee must perform duties of a trustee specified, inter alia, in § 704(8)), 1107 (duties of debtor in possession include duties of trustee under § 1106(a)(1)).

the U.S. Trustee's office referred to no notice or instruction to this effect that was ever given to either MIS or to petitioner.

Back in 1988, petitioner had negotiated to purchase a condominium in Atlantic City from Kalson Corp. The parties failed to close an agreement. Nevertheless, petitioner began payments; eventually, in October 1995, he received a deed.[6] The first two payments to the seller were made with personal checks from petitioner, in the memo portion of which was written, "Loan to ELOP." Josephine Thayer, petitioner's wife and co-defendant, explained that the property was purchased for ELOP's Fleet Helicopter Services. After the Thayers lost their Pennsylvania home in November 1996 due to financial reverses, Josephine testified, they moved into the Atlantic City condominium as their residence. Petitioner did not testify at trial.

During the Chapter 11 proceeding, ten payments for the Atlantic City condominium came out of MIS's account at First Lehigh Bank. The first two checks were payable to the seller, while the following eight checks were to the bank in exchange for cashier's checks, as the seller had requested. Corresponding statements were produced from MIS's First Lehigh account, for three dates in the second quarter of 1992, and for seven dates in the first quarter of 1993. During that time period, according to the uncontested testimony of CPA Gillespie, the defense expert, the MIS account contained substantial funds attributable to revenues of ELOP, often in excess of those attributable to MIS.

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[6] Although petitioner himself is listed as grantee on the last page of the 1995 deed, the first page states the grantee to be Atlantic County Investments, Inc.

About two years after filing, on November 17, 1993, a stipulation and order converting the MIS bankruptcy case from Chapter 11 to Chapter 7 was entered. On June 29, 1994, the court dismissed MIS's Chapter 7 bankruptcy case on the ground that "the debtor failed to attend the hearing mandated under Section 341 of the Bankruptcy Code and it had failed to attend any hearing or to attend the hearing to explain their [sic] absence."

c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)

The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed there. The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

REASONS FOR GRANTING THE WRIT

1. The Circuits are divided on the question whether a criminal violation of the tax-withholding law is established under 26 U.S.C. § 7202 where an employer files the required information returns without the accompanying payments.

The court below, in a published opinion, followed the Second Circuit in construing the provisions of 26 U.S.C. § 7202. The opinion disregarded the contrary interpretation by the Ninth Circuit. In doing so, the court below failed to follow this Court's cases guiding the construction of criminal statutes. Certiorari should be granted to resolve this inconsistency in the application of a criminal provision of the Internal Revenue Code.

One of petitioner William Thayer's companies, MIS, withheld moneys from its employees' gross pay for federal taxes and properly accounted for the withheld funds on Form 941 information returns, but in some quarters failed to remit those sums to the IRS. On the undisputed facts, the government thus failed to prove an element of the offense under 26 U.S.C. § 7202 -- it did not prove that petitioner failed to account truthfully to the IRS for the amounts that had been withheld from wages for income tax purposes but not paid over. The opinion of the court below mistakenly construes this ambiguous criminal statute as permitting conviction if the defendant fails in either of two duties imposed, rather than in both. Appx. A9-A11.

As the court below recognized, § 7202 title 26, the Internal Revenue Code, provides:

> Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall ... be guilty of a felony ....

(emphasis added). Under the statutory language, it is reasonably clear that willfully failing to collect the tax out of employees' wages is, by itself, an offense. No such failure was attributed to petitioner, however. Does the remaining clause, "fails to ... truthfully account for and pay over such tax," mean the same as "fails to truthfully account for or fails to pay over," or does it mean "fails both to account truthfully for and to pay over"? If the latter, no crime was committed. The opinion of the court below appears to "agree" with the view expressed by certain other courts that the statute's "plain language," Appx. A9, supports the former reading. Nevertheless,

the court of appeals discusses and attempts to refute petitioner's showing of ambiguity for another page and a half of the opinion.

As this Court has acknowledged, discussing a closely related problem in the reading of 26 U.S.C. § 6672, a civil enforcement companion provision to § 7202, "neither construction is inconsistent with the language of the statute." Slodov v. United States, 436 U.S. 238, 247 (1978).[7] It is therefore not surprising that where, as here, there has been a failure to pay but no failure to file even a single required Form 941, the Circuits are divided on the question whether failure to make a truthful accounting is an additional or an alternative element.

The construction petitioner advocates was adopted in the first reported opinion addressing a prosecution for failure to withhold and pay over taxes. Thus, in Wilson v. United States, 250 F.2d 312, 318 (9th Cir. 1957, as

[7] The Court in Slodov addressed the question whether a "person," as defined in 26 U.S.C. § 6671(b) (and thus presumably also in the identically-worded § 7343, which applies to § 7202) who assumes control of a corporate employer after the company has collected trust fund taxes, but before it pays them over, is a "person required under this title to collect, account for, and pay over" such taxes, as that phrase (which also appears in § 7202) is used in § 6672. To this question the Court answered Yes, relying on the purpose of the statute as disclosed in its legislative history. 436 U.S. at 245-50. The Court ultimately held petitioner Slodov not liable for the "100% penalty" imposed on "responsible persons" by IRC §§ 6671-6672, however, because the "long-term effect" of the government construction of the statute "arguably would more likely frustrate than aid the IRS's collection efforts." 436 U.S. at 251.

modified 1958), the president and founder of a logging and sawmill company was prosecuted under two clauses of former 26 U.S.C. § 2702(c) (1939) for willfully failing to collect, account for and pay over withheld taxes (what is now a violation of § 7202), and for attempting to evade and defeat the payment of those taxes (which is now prohibited by § 7201). Like petitioner, however, Wilson had in fact filed all required returns, but had not directed the payment of the taxes. The court of appeals ruled: "Since appellant both collected and accounted for the withheld monies, conviction under this section can be predicated only on the willful attempt to evade or defeat due payment of the taxes." 250 F.2d at 318.

In United States v. Poll, 521 F.2d 329 (9th Cir. 1975), the Ninth Circuit reaffirmed under the 1954 Code the decision it had made in Wilson under the 1939 Code, that violation of this law consists of a willful failure in both duties. "We continue to regard the crime as requiring two failures to act, willful failure to truthfully account *and* willful failure to pay over." Poll, 521 F.2d at 335 n.3.

The court below, however, followed United States v. Evangelista, 122 F.3d 112, 120-21 (2d Cir. 1997), in holding that failure in either duty constitutes an offense. For both policy and grammatical statutory construction reasons, the Ninth Circuit's reading of the statute is more persuasive than that of the Second Circuit and of the Third Circuit below. (The Department of Justice, naturally, concurs with the position taken below. 1 Dept. of Justice, Crim. Tax Man. § 9.03 (7th ed. 1994).) The leading treatise, on the other hand, finds:

> ample merit to the view that this offense requires the government to prove that the

> defendant both failed to account for and pay over the tax in order to convict. Hence, if the responsible person failed to pay over the tax, but filed truthful returns reflecting the amounts due, he could not be convicted. This conclusion derives from the language of the statute itself ....

1 Ian M. Comisky, Lawrence S. Feld & Steven M. Harris, *Tax Fraud and Evasion* ¶2.08, at 2-75 (6th ed. 1995).

As already quoted, section 7202 applies to any "person required under this title to collect, account for, and pay over any tax imposed by this title" and criminalizes any such person "who willfully fails to collect or truthfully account for and pay over such tax." Section 7202 thus identifies at least two separate duties in which the employer must not fail: "to collect ... such tax" and "to ... truthfully account for and pay over ... such tax." The disjunctive "or" between the statements of these duties, as well as the use of the infinitive preposition "to" only once to commence the list of duties, strongly suggests that a willful failure to "collect" an employee's income tax out of gross wages, for example, as required by IRC § 3401, would alone be sufficient for conviction. The "collect" clause is not at issue here, as petitioner was not accused or convicted under that clause. See Jones v. United States, 526 U.S. 227, 143 L.Ed.2d 311, 319-20 (1999) (making similar structural analysis of numbered subsections to determine their function in a statute).

With respect to the alternate means of violating the statute, failing to "truthfully account for and pay over" the tax, the Second Circuit's view, like that of the court below, is simply that one cannot satisfy an obligation to do two things without doing both of them, so that failing

to do either violates the statute. Evangelista, 122 F.3d at 121. As noted in Slodov, this is grammatically plausible. 436 U.S. at 247. The Second Circuit's assertion, apparently endorsed by the court below, that "plain language" supports its conclusion, Appx. A9, however, is contrary to this Court's statement, concerning essentially identical wording, that "neither construction is inconsistent with the language of the statute ...." Slodov, id.

The problem with the reading of § 7202 adopted by the court below is that it results in the "and" meaning the same as if it said "or." While that way of understanding statutes is sometimes appropriate (see, e.g., DeSylva v. Ballentine, 351 U.S. 570, 572-73 (1956)), it fails here, where the "and" contrasts with an "or" in the very same sentence. In this situation, it is presumed that the legislature meant "or" when it said "or," and something else when it chose to use different language; in particular, that it intended a conjunctive when it wrote "and" rather than another "or." See Reiter v. Sonotone Corp., 442 U.S. 330, 333-39 (1979); Flora v. United States, 362 U.S. 623, 632 (1960) ("the statute more readily lends itself to the disjunctive reading which is suggested by the connective 'or'"). The panel opinion disregards this important grammatical clue to the statute's proper construction.

The Evangelista court, followed in the opinion of the court below, viewed the Ninth Circuit's reading of § 7202 as:

> inconsistent with any reasonable understanding of the purposes of the statute. It would result in a greater penalty for one who simply failed to collect trust fund taxes than for one who collect[ed] them and, as is charged here, used them for his own selfish

> purposes ... so long as he notified the IRS that he had collected the tax.

122 F.3d at 121, quoting United States v. Brennick, 908 F.Supp. 1004, 1017 (D.Mass. 1995) (ellipsis original).[8] The contrary is true.

Penalties in the Internal Revenue Code are often structured to encourage voluntary disclosure, so as to reduce the costs and increase the success of detection and enforcement. The Code thus often punishes offenses involving nondisclosure more heavily than those which involve only nonpayment. See, e.g., Muste v. Comm'r, 35 T.C. 913 (1961) (onerous fraud penalty not applicable to candidly disclosed but adamant refusal to pay tax); 1 Comisky, et al., ¶8.02[7][a], at 8-55 ("even flagrant disobedience, without evidence of a specific intent to defraud is not fraud. If certain return disclosure requirements are met, even the accuracy-related penalty may not be imposed" (footnotes omitted)); compare 26 U.S.C. § 6651(a)(1) (5% per month penalty on late filing) with id. § 6651(a)(2) (0.5% penalty per month for late payment). Certainly, it is quite "reasonable" to read the statute as encouraging delinquent employers at least to file the Form 941s that reveal their nonpayment, by not imposing a felony label if the employer does so. Cf. IRC § 7215 (related misdemeanor).

If the penalty for failing to pay without disclosing that fact is the same as for nonpayment coupled with disclosure, the "rational" but cash-poor employer will not file the Form 941 information returns, thus increasing IRS's burden of detection and proof. The court below

[8] The district court relied on Brennick in dismissing this argument without further discussion. Appx. B22.

appears to acknowledge that by virtue of this effect, which is consistent with the overall statutory purpose, the petitioner's more lenient reading of § 7202 is not illogical or contrary to the policy of the statute.

The decision below is mistaken, then, both in principle and as a matter of fact, when it supposes that "on Thayer's reading, those who collect the taxes and spend them on personal expenses, effectively stealing the tax money, will receive no criminal penalties, whereas those who never collect the taxes at all face criminal sanctions." Appx. A11. First, it is not true that persons in petitioner's position, on his reading of the statute, could not be prosecuted. It is an offense under IRC § 7203 willfully to fail to pay any tax, under § 7201 to attempt willfully to evade or defeat the payment of any tax, under 18 U.S.C. § 371 to conspire to defraud the United States, and under id. § 641 to steal or embezzle any property of the United States. Under one or more of these provisions, and no doubt under many others, a determined prosecutor would not let such a culprit slip the net.

In principle, moreover, the response to petitioner's statutory construction argument by the court below must also fail. The Third Circuit's reasoning boils down to this: if under the defendant's construction of the ambiguous statute under which he was prosecuted his misconduct would not be a crime, then that conduct must be covered by the statute. This is not a maxim of statutory construction for avoiding application of the rule of lenity; it is simply a tautological negation of that rule. See Busic v. United States, 446 U.S. 398, 408-09 (1980) (rejecting argument for harsher interpretation of statute based on "assumption that ... Congress' sole objective was to increase the penalties ... to the maximum extent possible").

On its face, as this Court acknowledged in Slodov with respect to the civil penalty, 436 U.S. at 247, there is a "grievous ambiguity or uncertainty in the statute." Muscarello v. United States, 524 U.S. 125, 139 (1998) (quoting earlier cases). In other words, at the very least, "after seizing everything from which aid can be derived," it is possible only to "guess as to what Congress intended." Id., quoting Reno v. Koray, 515 U.S. 482, 499 (1995). Thus, the rule of lenity requires that the statute be given the narrower scope. Ratzlaf v. United States, 510 U.S. 135, 148-49 (1994).

The only other point the lower court advanced in support of its interpretation is to quote the title line (sometimes called the "catchline") of § 7202: "Willful failure to collect or pay over tax." Appx. A11, citing INS v. National Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 189 (1991). Only rarely has this Court resorted to reliance on a catchline to aid in determining a statute's meaning, apparently never as more than a supplement to some other, stronger argument,[9] and apparently never at all in a criminal case. Indeed, in FTC v. Mandel Bros., Inc., 359 U.S. 385, 388-89 (1959), cited in both INS v. National Center and Mead Corp. v. Tilley, note 9 ante, the Court expressly tied its reliance on the title of the Act to the fact that it was construing "remedial legislation of a regulatory nature," 359 U.S. at 389, contrasting "the problem of a penal statute that deserves strict construc-

[9] Thus, in INS v. National Ctr., the case cited by the court below, this Court relied principally on the responsible agency's longstanding interpretation of the ambiguous language. In Mead Corp. v. Tilley, 490 U.S. 714, 723 (1989), the Court also applied a rule of deference to agency interpretation, pointing only secondarily to certain introductory statutory language.

tion." Id.[10] An inconsistency between the shorthand section title and the statutory language, as here, is too slender a reed to bear the weight the court below would put on it in this case.

Because the unnecessarily broad construction of this ambiguous penal statute by the Third Circuit below conflicts with decisions of the Ninth Circuit and is contrary to this Court's precedent, the Court should grant the instant petition for a writ of certiorari on this issue. Upon full consideration of the case, because the evidence at trial proved that petitioner did not fail truthfully to account for the withheld taxes of MIS, judgments of acquittal must be directed to be entered on Counts 1, 5, 12, 15, 17, 19 and 20. Resentencing on the remaining counts will then be required.

2. The decision of the court below conflicts with this Court's decisions in Dunn, Chiarella and McCormick by deciding de novo what should have been a jury question: Whether petitioner was shown, by virtue of his position in the corporation, to be a person "under a duty to perform the act" of paying over withheld employment taxes to the IRS.

Petitioner Thayer argued on appeal that he was not a "person required to collect, truthfully account for, and pay over" the withheld employment taxes which were the subject of the tax counts of the indictment, 26 U.S.C.

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[10] In Caminetti v. United States, 242 U.S. 470, 490 (1917), the only criminal case apparently to have seen application of this doctrine, the Court rejected the defendants' attempt to use the title of an Act to narrow its application, in favor of the plain and broader meaning of the statutory language.

§ 7202, because that duty is imposed by the Internal Revenue Code only on an "employer," id. § 3403, which in this case was not himself but rather a corporation. "Congress ... has not made corporate officers personally liable for the corporation's tax obligations generally ...." Slodov v. United States, 436 U.S. 238, 254 (1978). Relying on a definitional provision of the statute that both parties (and apparently the trial court as well) had overlooked, id. § 7343 (defining term "person" as used, inter alia, in id. § 7202[11]), the court below concluded that petitioner was such a "person." Appx. A7-A9. The court's analysis resolves that question of insufficient evidence in a manner fundamentally at odds with a basic doctrine of criminal appeals announced and applied by this Court.

Section 7343 provides that, as used in the criminal provisions of the Code, "the term 'person' ... includes an officer or employee of a corporation ... who as such officer [or] employee ... is under a duty to perform the act in respect of which the violation occurs." (In this case, "the act in respect of which the violation occur[red]" was the required periodic paying over of trust fund taxes to the IRS, after withholding them from wages. See 26 U.S.C. §§ 3401-3403 [requirement of withholding from employees], 7501 [amounts withheld "shall be held to be a special fund in trust for the United States"].) However, whether petitioner Thayer was, by virtue of his position as president and 80% owner of Mobile Inmate Systems ("MIS"), himself in fact and law under such a duty is

[11] This Court also appears to have overlooked IRC § 7343 in drafting the decision in Slodov, which fails to cite the provision, although it would have been pertinent to a number of the points made in that opinion.

something the government would have to prove.[12] As the factual basis for finding that petitioner, in particular, had any such duty was never presented to the jury, this theory could not have been the basis for an appellate affirmance. Dunn v. United States, 442 U.S. 100, 106 (1979). Accord, McCormick v. United States, 500 U.S. 257, 269 & n.8 (1991); Chiarella v. United States, 445 U.S. 222, 236-27 & n.21 (1980).

The trial court instructed, based on cases construing Code § 6671(b):

> A person required to pay over to the Internal Revenue Service withholding and FICA taxes that were deducted and collected from the wages of employees is a person who has control over a business's affairs, including its financial affairs[,] and can include an officer or employee of a corporation.

CA3 App. 101a. A judge deciding a § 6672 "100% penalty" (now referred to by the IRS as the "Trust Fund Recovery Penalty," or "TFRP") civil case would consider many other factors, too, however. See Greenberg v. United States, 46 F.3d 239, 243 (3d Cir. 1994), quoting

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[12] If there is any law directly imposing such a "duty" on a person in petitioner's position, neither the district court, the government, nor the court below ever cited it. If that "duty" existed, on the other hand, in the contractual or fiduciary context of petitioner Thayer's office or employment ("as such officer [or] employee") by virtue of the corporate structure of MIS, or by virtue of some written or implied contract, or corporate resolution, or the like, that would be a matter of fact that the prosecution would have the burden to have proved at trial.

Quattrone Accountants, Inc. v. IRS, 895 F.2d 921, 954-55 (3d Cir. 1990).[13]

The IRS itself advises its collection officers to make a similar determination, in civil cases under IRC § 6672(b), "dependent on the facts and circumstances of each case." Int.Rev.Man., ch. 5.7 (Trust Fund Handbook) ¶3.3(1) (1998). "Liability ... stems from control over one or more of these statutory duties." Int.Rev. Man., Handbook 57(16) (Legal Reference Guide for Revenue Officers), ¶721(5) (1985). The Trust Fund Handbook describes the kinds of facts to be considered at great length. Int.Rev.Man., ch. 5.7, ¶ 3.3(3)-(5). See also Int.Rev.Man., ch. 1218 (Policies of the Internal Revenue Service Handbook), P-5-60 ("Responsibility is a matter of status, duty, and authority. ... In order to make

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[13] As the court of appeals explained in Greenberg, quoting Quattrone Accountants:

> In determining whether an individual is a person responsible for paying over withholding taxes, courts consider the following factors:
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> (1) the contents of the corporate bylaws, (2) ability to sign checks on the company's bank account, (3) signature on the employer's federal quarterly and other tax returns, (4) payment of other creditors in lieu of the United States, (5) identity of officers, directors, and principal stockholders in the firm, (6) identity of individuals in charge of hiring and discharging employees, and (7) identity of individuals in charge of the firm's financial affairs.

Id. On many if not most of these factors, the prosecution presented no evidence at the Thayer trial.

accurate determinations, all relevant issues should be thoroughly investigated.") (1993).

Whether these same standards govern in a criminal case, to which § 7343 rather than the identically-worded § 6671(b) applies, does not appear ever to have been previously decided; Slodov, however, suggests in dictum that the standards are the same. See 436 U.S. at 245, 247. It does not seem possible, however, that a "duty" under such a tax provision could be created or imposed by case law, rather than by statute, IRS regulation, corporate by-law, or contract. In any event, in a criminal case under §§ 7202 and 7343, unlike a civil tax penalty case under §§ 6671-6672, that issue would have to be decided by the jury, not by the court (and certainly not by an appellate court) in the first instance, as the decision below attempts to do.

For this reason as well, the Court should grant this petition for a writ of certiorari to decide whether the issue of who is a "person" within the special definition found at 26 U.S.C. § 7343 is a jury question, and reverse the judgment of the United States Court of Appeals for the Third Circuit.

3. The Court should grant the writ to decide whether a "knowing and fraudulent" concealment of bankruptcy assets can exist in the absence of proof of knowledge of any duty to disclose those assets.

With respect to the convictions for willful concealment of assets in bankruptcy, 18 U.S.C. § 152(1), petitioner argued on appeal that the trial evidence failed to show that he knew he had any duty to disclose to the creditors of MIS the moneys that were spent from MIS's

account during the Chapter 11 proceedings to pay for the Atlantic City condominium which he or one of the companies owned. He argued that logically there cannot be "knowing and fraudulent concealment" without proof of knowledge of a duty to disclose. The panel rejected that argument with a non sequitur:

> [T]he statute ... penalizes concealment of assets, not failure to file expense reports. There was sufficient evidence from which the jury could have concluded that Thayer's use of MIS funds to make payments on a condominium held in his name was an attempt to hide MIS' assets from the Bankruptcy Court and the creditors.

Appx. A12. The court's reasoning does not refute the petitioner's argument that the government failed to prove scienter on these counts.

Petitioner Thayer was not the debtor-in-possession; that was MIS, the corporation. The trial record is entirely bare of evidence that petitioner knew of any duty of disclosure of expenditures -- whether or not that disclosure might take the form of "expense reports" -- much less that the duty fell upon himself. Without such evidence there could not logically be proof of a "knowing and fraudulent" concealment, as required by the statute. See United States v. McCormick, 72 F.3d 1404, 1409-11 (9th Cir. 1995); United States v. White, 879 F.2d 1509, 1511-12 (7th Cir. 1989), cert. denied, 494 U.S. 1027 (1990) (both holding that knowledge and fraudulent intent required for § 152 conviction cannot be inferred from signatures on forms or receipt of checks alone, reversing convictions).

Knowledge of the duty, in a case like this, is part of the requirement of personal knowledge of the pertinent facts. See United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); Staples v. United States, 511 U.S. 600 (1994); Ratzlaf v. United States, 510 U.S. 135 (1994). The indictment's accusation of knowing and fraudulent "concealment" was based on a theory that assets of the MIS Chapter 11 estate were expended for the Atlantic City condominium without appropriate disclosure to the bankruptcy court or the creditors.[14]

The government's brief on appeal did not deny that personal knowledge of a duty of disclosure is a prerequisite to criminal liability under 18 U.S.C. § 152(1). Instead, it suggested only that such knowledge could be somehow inferred from petitioner Thayer's close personal involvement in MIS's bankruptcy and in its daily business affairs. CA3 Gov't Br. 28-29. The idea that petitioner had the specific and rather technical knowledge of this duty required by § 152(1) does not follow logically, much less beyond a reasonable doubt, from that kind of evidence. If petitioner had ever been notified of this duty by the bankruptcy court or the U.S. Trustee it

[14] In fact, the trial evidence also failed to show that petitioner Thayer, as opposed to the debtor corporation, MIS, had any duty to make any such disclosure, whether in the form of expense reports or otherwise. This case was not charged under 18 U.S.C. § 152(7), which prohibits an officer of a corporation from transferring or concealing corporate property with intent to defeat the bankruptcy laws. Nor was the jury instructed on any principle of bankruptcy law that would automatically impose such a duty to disclose on the corporate officer who signed and filed the petition, for example.

would have been simple enough for the government's witness, the attorney for the U.S. Trustee, to say so. Instead, the proof fell short on this vital point. The evidence was therefore insufficient to prove the mens rea element of the § 152 offenses.

The opinion of the court below greatly understates the kind of evidence necessary to show "knowing and fraudulent concealment" of bankruptcy assets by the owner of a corporation that is in Chapter 11 proceedings, in light of this Court's many cases on the centrality of the knowledge element in malum prohibitum statutes. Certiorari should be granted on this point, to consider whether knowledge of a duty to make reports must be shown before a person can be convicted for "knowingly and fraudulently concealing" facts from creditors by failing to disclose payments by the debtor-in-possession. For lack of evidence, the convictions on Counts 28 through 37 must be reversed and remanded for entry of judgments of acquittal. Resentencing on the remaining counts will then be necessary.

CONCLUSION

For the foregoing reasons, petitioner WILLIAM H. THAYER prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming his convictions.

Respectfully submitted,

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May 5, 2000.

APPENDIX A

201 F.3d 214
84 A.F.T.R.2d 99-7497, 2000-1 USTC ¶ 50,136

UNITED STATES of America
v.
William H. THAYER, Appellant

No. 98-1750.
United States Court of Appeals,
Third Circuit.

Argued July 29, 1999.
Decided Dec. 28, 1999.

***216** Peter Goldberger (Argued), Law Office of Peter Goldberger, Ardmore, Pennsylvania, Attorney for Appellant.

Ewald Zittlau (Argued), Office of United States Attorney, Philadelphia, Pennsylvania, Attorney for Appellee.

Before: SCIRICA and McKEE, Circuit Judges, and BROTMAN, District Judge*

OPINION OF THE COURT

SCIRICA, Circuit Judge.

Defendant William Thayer appeals his jury conviction and sentence. William Thayer and his wife and

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* The Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

co-defendant Josephine Thayer (who has not appealed her *217 conviction or sentence) were convicted on twenty counts of criminal liability for willful failure to pay over federal withholding and F.I.C.A. taxes in violation of 26 U.S.C. § 7202 and 18 U.S.C. § 2; willful filing of false claims against the government, in violation of 18 U.S.C. §§ 2, 152; and willful concealment of bankruptcy-estate assets, in violation of 18 U.S.C. §§ 2, 152. We will affirm the convictions, but will vacate the judgment of sentence and remand for further proceedings consistent with this opinion.

I. Background

A. Facts

William and Josephine Thayer were sole owners of two corporations, Mobile Inmate Systems Corp. (MIS) and Equipment Leasers of Pennsylvania, Inc. (ELOP).[1] MIS and ELOP both maintained corporate accounts at First Lehigh Bank, as did two other companies owned and operated by the Thayers. In the late 1980s or early 1990s First Lehigh Bank had asked Thayer to consolidate the funds of all four of his companies into one account maintained in MIS' name ("consolidated MIS account"). According to CPA Robert Gillespie, who testified for the Thayers at trial, both MIS and ELOP deposited money into the consolidated MIS account consistent with the bank's request.

Both MIS and ELOP accurately reported their employee federal withholding and F.I.C.A. taxes in IRS Form 941, Employer's Quarterly Federal Tax Return

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[1] William Thayer and Josephine Thayer owned 80% and 20% respectively and were President and Secretary respectively of both corporations.

under I.R.C. § 6672(a).[2] But from 1991 to 1993, MIS failed to pay over the federal withholding and F.I.C.A. taxes withheld from employees' wages in ten quarters. From 1991 to 1994, ELOP failed to pay over the federal withholding and F.I.C.A. taxes withheld in eleven quarters. In July 1991, William Thayer signed IRS Form 2751, "Proposed Assessment of 100 Percent Penalty," accepting personal responsibility for unpaid tax liabiiity and civil penalties for MIS' delinquent Form 941 taxes for two quarters in 1991. In June 1992, the Thayers signed IRS Form 2751 for ELOP's unpaid taxes for the second and fourth quarters of 1991, acknowledging the same personal responsibilities with regard to ELOP.

On their personal income tax returns (IRS Forms 1040) for 1991, 1992, and 1993, the Thayers reported negative or very small adjusted gross income based on losses carried forward and requested refunds for all or most of the money that had been withheld from their salaries in those years. Josephine Thayer testified she expected the IRS to automatically apply the refunds toward the unpaid withholding taxes and never expected to receive a cash payment. No money was sent to the Thayers.

In 1988 William Thayer bought a condominium in Atlantic City. Because he could not meet the purchase price at closing, the deed was held in escrow and Thayer commenced payments toward the purchase price. The sales agreement and deed listed William Thayer as grantee. Thayer made the first two payments on his personal checks, with "Loan to ELOP" written as nota-

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[2] MIS had 28 employees; ELOP had 16 employees.

tions. Subsequent payments were made from the MIS corporate checking account at First Lehigh Bank. At trial, Josephine Thayer testified that the condominium was bought for ELOP's business. CPA Gillespie testified that ELOP had sufficient money in the consolidated MIS account to cover the payments. In 1995, the condominium seller provided a new deed, which stated in one place that Thayer was the grantee and in another that Atlantic County Investments Inc. was the grantee. In late 1996, the Thayers moved into the condominium.

***218** In 1991, MIS petitioned for Chapter 11 bankruptcy. There were 24 creditors, all unsecured, including the IRS and the Pennsylvania Department of Revenue. During the Chapter 11 proceedings, ten payments were made from the consolidated MIS account at First Lehigh Bank for the Atlantic City condominium, totaling approximately $170,800. MIS did not file reports of its operating expenses as required by 11 U.S.C. § 704(8).

B. Procedural History

The Thayers were indicted on four clusters of charges and convicted by a jury on several counts. In Counts 1-21, the Thayers were charged with willful failure to pay over withheld taxes on behalf of MIS (ten quarters, Counts 1-10) and ELOP (11 quarters, Counts 11-21) in violation of I.R.C. § 7201 and 18 U.S.C. § 2. The Thayers were found guilty on the counts charging nonpayment of taxes for the quarters in which trial testimony established the companies had positive cash balances at some point during the quarter. The Thayers were acquitted of willful evasion of income taxes in violation of I.R.C. § 7201 and 18 U.S.C. § 2 (counts 22-24). The government charged the Thayers' corporations had paid for their personal living expenses by making

payments on the condominium, thus providing the Thayers with unreported income.

The Thayers were charged with willfully filing false claims (for tax refunds) against the United States in violation of 18 U.S.C. §§ 287 and 2 (counts 25-27). The government contended the Thayers had submitted claims for tax refunds with knowledge that MIS and ELOP owed taxes for which they were personally responsible. The jury found the Thayers guilty on all these counts.

The Thayers were also charged with willful concealment of bankruptcy-estate assets in violation of 18 U.S.C. §§ 152 and 2 (Counts 28-37). At issue were the payments made for the condominium in Atlantic City out of the consolidated MIS account. The government contended those payments were made with MIS money, and were concealed from the creditors in MIS' bankruptcy proceedings. The Thayers countered that the money, while drawn from the consolidated MIS account, was ELOP's money, not MIS'. The jury found the Thayers guilty on all these counts.

The Thayers filed a motion for acquittal under Fed.R.Crim.P. 29(c) and a motion for a new trial under Fed.R.Crim.P. 33, both of which the District Court denied.[3]

At sentencing, the court grouped the tax and bankruptcy counts separately. On the bankruptcy counts, two points were added to William Thayer's base offense level for violation of a judicial process under U.S.S.G.

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[3] The government has argued the motions were untimely. But the District Court noted that the Thayers had requested, and were granted, additional time to file. *United States v. Thayer*, 1998 WL 195940, at n. 2 (E.D.Pa. 1998).

§ 2F1.1(b)(3)(B). Although Thayer's offense level was 19, the court departed downward six levels. With a criminal history category of III, Thayer's sentencing range was 18-24 months. The court imposed an 18 month sentence, plus three years supervised release and restitution of $149,355.[4]

II. Jurisdiction and Standard of Review

The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

[1-3] Where the issues raised on appeal are preserved at trial, or through a timely motion for acquittal under Fed.R.Crim.P. 29(c), we will overturn a jury verdict "only when the record contains no evidence, regardless of how it is weighted, ***219** from which the jury could find guilt beyond a reasonable doubt...." *United States v. Anderson*, 108 F.3d 478, 481 (3d Cir. 1997) (internal quotation marks and citations omitted). But issues on appeal which were not raised before the District Court, we will review for plain error. See *United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). A conviction based on insufficient evidence is plain error only if the verdict "constitutes a fundamental miscarriage of justice." *United States v. Barel*, 939 F.2d 26, 37 (3d Cir. 1991). To the extent that Thayer's argument raises issues of statutory interpretation, we will exercise plenary review. *See United States v. Parise*, 159 F.3d 790, 794 (3d Cir. 1998); *United States v. Hayden*, 64 F.3d 126, 128 (3d Cir. 1995).[5]

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[4] Mrs. Thayer was sentenced to five years probation.

[5] Following the denial of the motions, Thayer obtained

III. Discussion

A. Withholdings

Thayer appeals his conviction for violations of I.R.C. § 7202, arguing as a matter of law he could not be found guilty of the withholding tax offenses charged. I.R.C. § 7202 penalizes "[a]ny person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax ...." Thayer claims § 7202 is inapplicable because he was not a person required to pay over withheld taxes and because he truthfully accounted for the unpaid taxes.

1. Person Required to Pay Over Tax

[4] As noted, only a "person required under this title to collect, account for, and pay over" withholding taxes is criminally liable under § 7202. Thayer argues that only employers such as MIS and ELOP who are required to withhold employees' taxes under I.R.C. §§ 3402-03 qualify. Thayer contends he was merely an officer and part-owner of the corporations, and not an "employer" as defined by the Internal Revenue Code.[6] Because this is a question of statutory interpretation, we will exercise plenary review. *See Parise*, 159 F.3d at 794; *Hayden*, 64 F.3d at 128.

(continued)

different defense counsel. In his appeal to this Court, Thayer raises issues not raised in the earlier Rule 29(c) and Rule 33 motions. Our standard of review will vary accordingly.

[6] The Code defines "employer" as "the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person...." I.R.C. § 3401. "Employee" is defined to include corporate officers. *See id.*

I.R.C. § 6672(a), applying the same language in § 7202, imposes civil penalties on "any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax." In *Slodov v. United States*, 436 U.S. 238, 98 S.Ct. 1778, 56 L.Ed.2d 251 (1978), the Supreme Court held that § 6672(a) applies to corporate officers or employees responsible for the collection and paying over of withholding taxes. *See id.* at 244-45, 98 S.Ct. 1778.[7] Although the government in *Slodov* sought only civil penalties, the Court stated that persons civilly liable under § 6672(a) could also be held criminally liable under § 7202. *See id.* at 245, 247, 98 S.Ct. 1778. Thayer urges us not to follow this apparent dicta in *Slodov*. He contends that a corporate officer is a "person" for purposes of § 6672(a) only because § 6671(b) specifies that the term "person," as used in I.R.C. ch. 68, subchapter B, encompassing §§ 6671-6724, "includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." But for purposes of § 7202, the term "person" is defined by identical language. *See* I.R.C. § 7343 ("The term 'person' as used in this chapter ***220** [I.R.C. ch. 75, encompassing §§ 7201-7344], includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the

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[7] We have applied the Court's holding in assessing civil penalties under § 6672 many times. *See, e.g., Greenberg v. United States*, 46 F.3d 239, 242-44 (3d Cir. 1994); *Quattrone Accountants, Inc. v. I.R.S.*, 895 F.2d 921, 927 (3d Cir. 1990).

violation occurs."). Therefore, Thayer, as the president and majority owner of MIS and ELOP, was properly charged and convicted as a "person" under § 7202.

2. Truthful Accounting

[5] Thayer contends the statute imposes criminal liability only on one who neither accounts for nor pays over withholding taxes. Since he did account for the withheld funds, Thayer argues the evidence was insufficient to convict him under § 7202.

As noted, § 7202 applies to one who "willfully fails to collect or truthfully account for and pay over" employees' income taxes. Thayer and the government both interpret this language to criminalize either of two acts: (1) willful failure to collect employees' income taxes or (2) willful failure to truthfully account for and pay over withheld taxes. Because Thayer accounted for the withheld taxes by reporting the withholdings on the corporations' quarterly tax returns, he can be convicted only under the second prong. Therefore, the question is whether a person who collects and accounts for but does not pay over taxes has failed to account for and pay over those taxes. Because this is a question of statutory interpretation, we will exercise plenary review. *See Parise*, 159 F.3d at 794; *Hayden*, 64 F.3d at 128.

The Court of Appeals for the Second Circuit faced the identical question and, relying on the reasoning in *United States v. Brennick*, 908 F.Supp. 1004 (D.Mass. 1995), ruled that § 7202 requires employers to both account for and pay over the taxes. The court held the plain language of the statute supported this reading: "'The phrase "truthfully account for and pay over" is ... unambiguously conjunctive. A person who was required to "truthfully account for and pay over" a tax would be

required to do both things to satisfy the requirement.'" *United States v. Evangelista*, 122 F.3d 112, 121 (2d Cir. 1997) (quoting *Brennick*, 908 F.Supp. at 1016) (omission in original). The court also noted that a contrary interpretation "'would result in a greater penalty for one who simply failed to collect trust fund taxes than for one who collect[ed] them and, as is charged here, used them for his own selfish purposes ..., so long as he notified the IRS that he had collected the tax. That Congress intended to make such a distinction is simply inconceivable.'" *Id.* at 121 (quoting *Brennick*, 908 F.Supp. at 1017) (omission in original). We agree.

[6] Thayer points out that, as the Second Circuit interpreted § 7202, the phrase "willfully fails to ... truthfully account for and pay over" has the same meaning as "willfully fails to ... truthfully account for or pay over," arguing that Congress might have exempted those who account for but do not pay over withholding taxes to encourage reporting, thereby facilitating collections. Conceding ambiguity, Thayer seeks to rely on the rule of lenity. *See, e.g., United States v. Turcks*, 41 F.3d 893, 901 (3d Cir. 1994). But "[t]he simple existence of some statutory ambiguity ... is not sufficient to warrant application of th[e] rule [of lenity], for most statutes are ambiguous to some degree .... The rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Muscarello v. United States*, 524 U.S. 125, 138, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998) (internal quotation marks and ellipses omitted).

Thayer suggests a rationale why Congress might have penalized more severely those who neither report nor pay over withholding taxes than those who report but

fail to pay over the taxes, but does not convincingly answer the Second Circuit's telling analysis: that on Thayer's reading, those who collect the taxes and spend them on personal expenses, effectively *221 stealing the tax moneys, will receive no criminal penalties, whereas those who never collect the taxes at all face criminal sanctions. We agree with the Court of Appeals for the Second Circuit that Congress could not plausibly have intended Thayer's reading of the statute.

[7] We also note the title of a section can assist in resolving ambiguities. *See I.N.S. v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189, 112 S.Ct. 551, 116 L.Ed.2d 546 (1991). Section 7202 is entitled, "Willful failure to collect or pay over tax," suggesting the section covers willful failure either to collect or to pay over the taxes. For the reasons stated, we hold Thayer was properly convicted under § 7202 for accounting for but failing to pay over withheld income taxes.

B. Bankruptcy Fraud

[8] Thayer asserts there was insufficient evidence to convict him of bankruptcy fraud under 18 U.S.C. § 152, contending the condominium payments were not made with MIS money, but rather with ELOP money maintained in the consolidated MIS account.[8] The statute, in relevant part, penalizes one who "knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the

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[8] Because this issue was properly raised before the District Court, we will review for sufficiency of evidence, and will affirm unless we find that the record contains no evidence from which the jury could find guilt beyond a reasonable doubt. *See Anderson*, 108 F.3d at 481.

control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor...." 18 U.S.C. § 152(1).

Although most of the condominium payments came from the consolidated MIS account, Thayer points out that his wife testified the condominium was purchased by ELOP and that CPA Gillespie testified that ELOP had sufficient funds in the consolidated account to cover the condominium payments. But the jury was free to reject Mrs. Thayer's and CPA Gillespie's testimony. *See Ranco Indus. Prods. Corp. v. Dunlap*, 776 F.2d 1135, 1141 (3d Cir. 1985). Although no accountant or other expert witness testified contrary to Gillespie, the jury could have concluded the funds for the condominium payments came from MIS because the checks were drawn from the consolidated MIS account at a time when ELOP maintained a separate account.[9]

Thayer also argues there was no evidence he knew he had a duty as president of MIS to report MIS' operating expenses and that such knowledge is required under 18 U.S.C. § 152. But the statute, as noted, penalizes concealment of assets, not failure to file expense reports. There was sufficient evidence from which the jury could have concluded that Thayer's use of MIS funds to make payments on a condominium held in his name was an attempt to hide MIS' assets from the Bankruptcy Court and the creditors.

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[9] Mr. Marvin, president of Lehigh Bank at all times relevant herein, testified that the ELOP account contained substantial funds during the time when MIS was in Chapter 11 bankruptcy.

C. Jury Instructions

[9,10] Thayer challenges the jury instructions issued on both the false claims and the bankruptcy fraud charges. When jury instructions are challenged, "we consider the totality of the instructions and not a particular sentence or paragraph in isolation." *United States v. Coyle*, 63 F.3d 1239, 1245 (3d Cir. 1995). The issue is "whether, viewed in light of the evidence, the charge as a whole fairly and adequately submits the issues in the case to the jury." *United States v. Zehrbach,* 47 F.3d 1252, 1264 (3d Cir. 1995) [(in banc)] (internal quotation marks omitted). Because Thayer's objections to the jury instructions were not made at trial, we will reverse only for plain ***222** error, which is found "sparingly and only where the error was sure to have had unfair prejudicial impact on the jury's deliberations." *Id.* at 1263 n. 9 (internal quotation marks omitted).

1. False Claims

[11] Early in its instructions to the jury, the court said,

> You determine what happened in this case, what the facts were in this case. Always focusing on the key element in all 37 counts which is willfulness. That's where you should focus your attention.

Later, the court instructed the jury on the false claims charges:[10]

> There are four elements, the defendants made a claim against the United States for payment. Defendants knew the claim to be false and fraudulent. The claim was made to a department or an

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[10] 18 U.S.C. §§ 287 and 2.

agency of the United States and the defendants acted knowingly and willfully.

There are two of the elements which are contested here. There is no question that the defendant made a claim for a refund. And ... there is no question that the claim was made to United States. That's element one and element three. Elements two and four are hotly contested .... The Government must prove those elements beyond a reasonable doubt.

. . . . . .

... The defendants deny those two elements. Therefore the government must prove them beyond a reasonable doubt.

. . . . . .

... [T]he defendants urge ... they didn't have the money to pay the withholding tax and they had been hoping to pay it, or at some time it would be paid, or they would straighten the paperwork out later and the best way to handle it was to seek a refund on the three returns filed. They've made other arguments against the Government on these claims, you'll remember them and assess them....

... If you find that they intended to deceive the government and wanted to get a check, my recollection is that Mrs. Thayer denied that. She said she never really expected to get a check and thought that this was a bookkeeping kind of thing. You need to assess that.

Thayer contends the court's instruction implied that the government was not required to prove beyond a reasonable doubt that the Thayers had presented a claim against the United States.

[12,13] The Fifth and Sixth Amendments require the government to prove each element of a criminal charge beyond a reasonable doubt whether or not the defendant presents evidence contesting the element. *See United States v. Gaudin*, 515 U.S. 506, 509-10, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 277-78, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). When a jury instruction is ambiguous and open to an unconstitutional interpretation, the instruction is error if there is a reasonable likelihood the jury accepted the erroneous interpretation. *See Jones v. United States*, 527 U.S. 373, 119 S.Ct. 2090, 2115, 144 L.Ed.2d 370 (1999); *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990); *Frey v. Fulcomer*, 132 F.3d 916, 921 (3d Cir. 1997), *cert. denied*, 524 U.S. 911, 118 S.Ct. 2076, 141 L.Ed.2d 151 (1998). But because we review for plain error, we will reverse only if the ambiguity in the instruction is "sure" to have had a prejudicial effect. *Zehrbach*, 47 F.3d at 1263 n. 9.

In this case, we believe the instruction was accurate and non-prejudicial. Thayer has not contested that the court properly described the elements of the offense. *See United States v. Okoronkwo*, 46 F.3d 426, 430 (5th Cir. 1995) (giving the elements of a § 287 offense as "(1) that the defendant ***223** presented a false or fraudulent claim against the United States; (2) that the claim was presented to an agency of the United States; and (3) that the defendant knew that the claim was false or fraudulent"). Instead he argues that his wife's testimony that she thought the government would automatically apply any refund to the Thayers' existing penalty was evidence contesting the first element of the offense charged (filing a claim against the United States),

contrary to the District Court's assertion that this issue was uncontested. We do not agree that Josephine Thayer's testimony, if believed, could establish the Thayers did not present a claim against the United States. Rather, her testimony contested that they acted wilfully and with knowledge that their claim was false and fraudulent. *See United States v. Parsons*, 967 F.2d 452, 456 (10th Cir. 1992) (holding requests for tax refunds are covered by § 287). We hold the District Court's instruction was neither inaccurate nor prejudicial, and in any event was not plain error.[11]

2. Bankruptcy Fraud

As noted, Thayer was convicted of concealing MIS' assets from its creditors by using MIS' funds to pay for the Thayers' condominium in Atlantic City, effectively transferring the money from MIS to the Thayers.

a. Identity of Bankrupt Corporation

[14] At trial, the Thayers argued the money used to pay for the condominium belonged to ELOP, not MIS. The court's charge on these counts was interrupted by a question from a juror:

> THE COURT: The elements are: ....
>
> Two, the defendant fraudulently concealed the property described in the indictment from creditors in the bankruptcy proceedings.
>
> . . . . . .
>
> The question here is, in the mind of the Government is, ... why was MIS's assets being used to buy this condo? ...

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[11] Thayer also makes a separate objection, that the trial judge mischaracterized Josephine Thayer's testimony. After review, we reject his argument.

> The Thayers' attorneys say no way. [The court reviewed several arguments, including the attorneys' claim] that the funds in the MIS bank account were really not MIS money, but were pooled money perhaps from ELOP or other activities of the Thayer corporations ....
>
> . . . . . .
>
> Yes?
>
> JUROR: Just to be clear, only MIS is in bankruptcy?
>
> THE COURT: Your recollection controls and you'll have the bankruptcy papers, but my recollection is that MIS went into bankruptcy first and then perhaps six months to nine months later ELOP went into bankruptcy.

Thayer maintains the court's reference to ELOP's bankruptcy suggested to the jury that it could convict if it concluded the Thayers were concealing ELOP's assets, although the indictment charged only concealment of MIS' assets.

[15] As we have explained, "[a] federal judge is permitted to summarize and comment upon the evidence .... The court's comments, however, may not confuse or mislead the jury, or become so one-sided as to assume an advocate's position." *American Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 327 (3d Cir. 1985) (ellipsis in original), *quoted in Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 617 (3d Cir. 1991). In *American Home Assurance*, we held the District Court erred during the jury charge by stating that certain expert witnesses had been compensated for their testimony, when there was no such evidence in the record. *See* 753 F.2d at 326-27. In *Hughes*, the defendant was

accused of fraudulently inducing the plaintiffs to sell land at below-market prices. The District Court told the jury that if the defendant *224 claimed that plaintiffs' property could be condemned for a fixed price in the event that plaintiffs refused to sell, the defendant had "lied." 945 F.2d at 617. We found no prejudicial error, because the court accurately summarized the evidence and informed the jury that it did not "have to be influenced" by the court's summary. *Id.*; *see also Haines v. Powermatic Houdaille, Inc.*, 661 F.2d 94, 95 (8th Cir. 1981) (finding no prejudicial error where the trial judge misstated an important piece of evidence but repeatedly cautioned the jury that the court's statements were not evidence).

Here, the District Court accurately explained to the jury that the Thayers were charged with using MIS' funds to make payments on the Atlantic City condominium and summarized the Thayers' defense, that the money used belonged to ELOP. In response to a juror's question, the judge accurately described the bankruptcy status of both MIS and ELOP, while reminding the jurors that their recollection, and not the court's, controlled. We find nothing in the court's charge that would have created or contributed to the alleged confusion, much less anything that was sure to prejudice the jury's deliberations. Thayer did not request a curative instruction following the juror's question and the District Court was not obliged to issue one *sua sponte*. We see no plain error here.

b. Transfer of Assets

[16] Thayer has a second objection to the bankruptcy concealment instruction. We quote again from the jury charge:

Counts 28 through 37 charge[ ] willful concealment of assets from the Bankruptcy Court. The law provides whoever knowingly and fraudulently conceals from the custodians, trustee, marshal or other officer of the bankruptcy [court] charged with the control or custody of property, or from creditors in any case in bankruptcy shall be guilty of a felony.

. . . . . .

The elements are: One, on or about the date alleged in the indictment, the proceeding in bankruptcy was in existence. That's not in dispute.

Two, the defendant fraudulently concealed the property described in the indictment from creditors in the bankruptcy proceedings.

And, three, that such property belonged to the estate of the debtor.

A person fraudulently conceals property of the estate of a debtor when that person knowingly withholds information or property or knowingly acts for the purpose of preventing the discovery of such property, intending to deceive or cheat a creditor, a trustee, or a custodian or a bankruptcy judge.

Fraudulently concealing property of the estate of the debtor may include transferring property to a third party, destroying the property, withholding knowledge concerning the existence or whereabouts of property, or knowingly doing anything else by which the person acts to hinder, delay or defraud any of the creditors.

The act of concealment does not depend on the amount or value of the property involved. It is sufficient if a substantial amount of property was know-

ingly and fraudulently concealed or transferred by the accused as charged in the indictment ....[12]

*225 Thayer objects to the court's statement, "It is sufficient if a substantial amount of property was knowingly

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[12] The Court's charge continued:

The question here is, in the mind of the Government is, since this came out of the MIS checking account and since MIS was in a Chapter 11 reorganization at that time, what was MIS's asset, why was MIS's assets being used to buy this condo? The Government suggests that it was fraudulent in that there was an attempt here to conceal the assets, to transfer them out of the bankruptcy estate away from the creditors and to keep the creditors from enjoying the benefits of the amounts of money that were transferred to Kalustyan Corporation.

The Government says guess what happened, the Thayers end up owning a condo, the Government suggests that the Thayers end up using a condo in Atlantic City now owned by a corporation about which we have little information. And the Government suggests that this was intentional, deliberate and fraudulent. And the Government says to you that its proved that beyond a reasonable doubt.

The Thayers' attorneys say no way. They say that the condo was a corporate asset, intended to be a corporate asset and was used in corporate business substantially. That weekend use by family members is something to be expected of corporate assets and is certainly not fraud by the furthest stretch of the imagination. They say that there was an assignment of Thayer's interest in this condo to the ELOP Corporation and they say finally that the funds in the MIS bank account were really not MIS money, but were pooled money perhaps from ELOP or other activities of the Thayer corporations and was not a diversion of assets from the Bankruptcy Court.

and fraudulently concealed or transferred by the accused as charged in the indictment," contending the court suggested that simply the transfer of assets, not the transfer of assets with intent to conceal, can justify a conviction.

The Thayers were indicted under 18 U.S.C. § 152. The language in the court's jury charge mirrors that of subsection 152(1), making it unlawful to "knowingly and fraudulently conceal[ ] from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor."[13] We believe the charge, viewed in its entirety, correctly stated the law of subsection 152(1). The District Court properly charged fraudulent concealment as an element of the offense, stating that Thayer could be convicted if found to have "knowingly and fraudulently concealed or transferred" MIS' assets, which we have no doubt the jury understood to mean "knowingly and fraudulently concealed or [knowingly and fraudulently] transferred" MIS' assets. The court explained that an act was fraudulent if done as part of an attempt to conceal the debtor's assets. We hold the District Court properly instructed the jury that Thayer could be convicted only if he transferred MIS' assets with the intent to conceal them. *See United States v. Turner*, 725 F.2d 1154, 1157 (8th Cir. 1984) (approving of jury instructions defining "concealment" for purposes of § 152 to include "not only secreting, falsifying and mutilating ... but also ...

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[13] The court quoted subsection 152(1) almost verbatim at the beginning of the charge.

preventing discovery, fraudulently transferring or withholding knowledge or information required by law to be made known").

D. Sentencing

[17] Because Thayer's objections to his sentence were raised before the District Court, we review the court's factual findings for clear error and its interpretation of the guidelines de novo. *See United States v. Felton*, 55 F.3d 861, 864 (3d Cir. 1995).

1. Grouping

[18] As noted, the District Court grouped the bankruptcy convictions separately from the tax offenses at sentencing. Thayer contends U.S.S.G. § 3D1.2(b) (1998) required the District Court to group all the offenses. Section 3D1.2(b) mandates grouping "[w]hen counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan." In this case, we do not believe the first requirement was met, namely that the victims of the crimes be the same. Therefore, we agree with the District Court that grouping under § 3D1.2(b) was inappropriate here.

As Thayer concedes, the United States was the only victim of the tax fraud counts, and the IRS was a creditor and therefore a victim of the bankruptcy-assets concealment count. Although MIS had 24 creditors, Thayer notes the sentencing guidelines' ***226** commentary explain, "[G]enerally, there will be one person ... identifiable as the victim" because " 'victim' is not intended to include indirect or secondary victims ...." U.S.S.G. § 3D1.2(b), comment. (n.2). He argues that the United States was the primary victim and therefore the sole victim for grouping purposes, and the rest of the

victims were secondary. According to MIS' Chapter 11 petition, prepared by the Thayers, MIS' federal tax debt at the time of bankruptcy was $480,000, representing approximately 73% of MIS' total debt and 96% of its debt to priority creditors. Nevertheless, in this case we find there were multiple victims of Thayer's concealment.

[19] Grouping is determined according to the primary victim Congress sought to protect in enacting a statute. *See United States v. Ketcham*, 80 F.3d 789, 793 (3d Cir. 1996). 18 U.S.C. § 152 is "a congressional attempt to cover all of the possible methods by which a debtor or any other person may attempt to defeat the intent and effect of the bankruptcy law through any type of effort to keep assets from being equitably distributed among creditors." *United States v. Goodstein*, 883 F.2d 1362, 1369 (7th Cir. 1989) (internal quotation marks omitted); *see also Stuhley v. Hyatt*, 667 F.2d 807, 809 n. 3 (9th Cir. 1982) (holding that Congress' principal objective in enacting § 152 was "to prevent and punish efforts by a bankrupt to avoid the distribution of any part of a viable bankrupt estate"); *United States v. Shapiro*, 101 F.2d 375, 379 (7th Cir. 1939) ("The object of Congress in passing [the predecessor to § 152] was to punish those debtors who, although wanting relief from their debts, did not want to surrender what property there was to creditors."). All creditors benefit from the integrity of the bankruptcy system, which guarantees that to the maximum extent feasible the bankrupt's debts will be repaid. Accepting Thayer's representations in MIS' bankruptcy petition as true, MIS owed more than $150,000 to 22 creditors (excluding the IRS and the Pennsylvania Department of Revenue), including debts of $26,064, $15,315, and $10,250 to various individual creditors. These are

substantial sums, and we cannot describe these creditors as "secondary" victims of Thayer's fraudulent concealment. *Cf. United States v. Nazifpour*, 944 F.2d 472, 474 (9th Cir. 1991) (finding all creditors to be victims of bankruptcy fraud for purposes of U.S.S.G. § 2F1.1(b)-(2)(B), which enhances the sentence of a defendant who defrauds more than one victim). Because the victims of the bankruptcy and tax offenses were not the same, the District Court properly refused to group Thayer's bankruptcy and tax offenses under § 3D1.2(b).[14]

2. Enhancement for Violation of Judicial Process

[20] The District Court enhanced Thayer's sentence by two levels for "violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines ...." U.S.S.G. § 2F1.1(b)(4)(B) (1998). The District Court relied on the probation office's finding, asserted by the government, that such an enhancement is appropriate whenever a defendant is convicted of concealing assets in a bankruptcy case. Thayer argues the enhancement can be given only when a specific court order is violated.

Several courts of appeals have taken the position now advanced by the government. Most have reasoned that a bankruptcy proceeding constitutes a "judicial ... process" under § 2F1.1(b)(4)(B), a process violated by concealment of assets. As the Court Appeals for the Eighth Circuit explained,

> Lloyd [the debtor] did not violate a specific judicial order, injunction, or decree; however, Lloyd did

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[14] Because Thayer has not established that there was a single victim, we do not need to reach the common scheme or plan element required for grouping.

> violate a judicial process by fraudulently concealing assets from the bankruptcy court officers. *227 Lloyd sought protection from his creditors under the shelter of bankruptcy when he filed his Chapter 11 petition. Lloyd then abused the bankruptcy process and hindered the orderly administration of bankruptcy estate by concealing assets.

United States v. Lloyd, 947 F.2d 339, 340 (8th Cir. 1991) (per curiam); *accord United States v. Guthrie*, 144 F.3d 1006, 1010-11 (6th Cir. 1998); *United States v. Messner*, 107 F.3d 1448, 1457 (10th Cir. 1997); *United States v. Welch*, 103 F.3d 906, 908 (9th Cir. 1996) (per curiam); *United States v. Michalek*, 54 F.3d 325, 332-33 (7th Cir. 1995). Some courts have applied the enhancement on a separate theory, holding the Bankruptcy Rules and Forms constitute orders of the court:

> Black's Law Dictionary defines the word "order" as follows: "A mandate; precept; command or direction authoritatively given; rule or regulation." The mandate of the Bankruptcy Rules and Official Forms that a debtor truthfully disclose assets and liabilities falls within this definition. Moreover, the mandate is in the context of formal, adversary court proceedings, and Bellew [the debtor] necessarily knew that he was violating the mandate when he signed the declarations required by Form Numbers 1 and 6.

United States v. Bellew, 35 F.3d 518, 520-21 (11th Cir. 1994) (per curiam) (footnote omitted); *accord Michalek*, 54 F.3d at 332-33; *United States v. Saacks*, 131 F.3d 540, 545 (5th Cir. 1997). Several of these courts have emphasized the broad applicability of U.S.S.G. § 2F1.1, the base offense provision for fraud, and the need to punish bankruptcy fraud more severely than other types of fraud:

> [I]n neither § 2F1.1 nor any other section of the Guidelines is there either a base offense level or an enhancement provision for bankruptcy fraud as such. Consequently, were we to stop with the general sentencing provisions for fraud, we would fail to make any distinction between the most pedestrian federal fraud offense and bankruptcy fraud with all of its implications of a scheme to dupe the bankruptcy court, the trustee, and the creditor or creditors of the debtor, i.e., the entire federal system of bankruptcy.

Saacks, 131 F.3d at 543-44; *accord Guthrie*, 144 F.3d at 1010 ("[T]he Sentencing Guidelines' fraud provision is a very broad guideline encompassing a wide variety of offenses; because bankruptcy fraud involves a higher level of culpability due to its deception of the court, the offense warrants a greater punishment."); *Michalek*, 54 F.3d at 332.

Although these arguments have merit, we are not convinced. Instead we are persuaded by the analyses of the Courts of Appeals for the First and Second Circuits. *See United States v. Shadduck*, 112 F.3d 523, 530 (1st Cir. 1997) (reaching only the claim that the Bankruptcy Rules and Forms constitute orders of the court); *United States v. Carrozzella*, 105 F.3d 796, 800 (2d Cir. 1997) (expressing "skepticism" about the enhancement of bankruptcy fraud cases under § 2F1.1(b)(4)(B), but ultimately reversing on other grounds). Both courts relied in part on the commentary to § 2F1.1(b)(4)(B), which, in its current form, explains that the section

> provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the

> defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case.

U.S.S.G. § 2F1.1, comment. (n.6).

The comment's reference to "the prior decree or order" seems to suggest that the drafters expected this subsection to be applied only to defendants who violated an order arising out of a previous judicial proceeding, although this is unclear. But ***228** the crucial inquiry here appears to focus on the proper interpretation of the term "judicial process." While this term could be read to encompass an entire judicial proceeding, e.g. the entire bankruptcy proceeding, it seems more likely it was intended to be applied in a more circumscribed manner.

As the Second Circuit reasoned,

> "Violation" strongly suggests the existence of a command or warning followed by disobedience. This analysis in turn suggests that the term "process"--the command or warning violated--is used, not in the sense of legal proceedings generally, but in the sense of a command or order to a specific party, such as a summons or execution issued in a particular action. This narrower reading of Section [2F1.1(b)(4)(B)] is also consistent with the general practice -- known as ejusdem generis -- of construing general language in an enumeration of more specific things in a way that limits the general language to the same class of things enumerated. In the present circumstances, the word "process" follows "injunction, order, [or] decree" and is most easily read in the narrower sense of a command or order issued to a specific person or party.

Carrozzella, 105 F.3d at 800 (citations omitted, second alteration in original). We agree.

We also agree with the Court of Appeals for the First Circuit that the Rules and Forms of the Bankruptcy Court in the sentencing context are not judicial orders, injunctions, decrees, or processes. The Bankruptcy Rules and Forms have more in common with statutes and procedural rules of general application than with orders of the court, which are directed to identified parties and indicate in specific terms what those parties are required to do. *See Shadduck*, 112 F.3d at 530.

In reaching its holding, the Court of Appeals for the First Circuit looked to the commentary guidelines for assistance, which provide:

> A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

U.S.S.G. § 2F1.1, comment. (backg'd.). The Court of Appeals for the First Circuit found the commentary supported its conclusion that the violation of a bankruptcy rule does not require an enhancement under U.S.S.G. § 2F1.1(b)(4)(B):

> The accompanying exemplar describes a defendant who has been enjoined in a prior proceeding from engaging in certain conduct, but who violated the injunction anyway by committing the fraud for which he was awaiting sentence. (Citation omitted). Thus, the commentary makes clear that the rationale for the enhancement is to redress the "aggravated

> criminal intent" inherent in violating a prior order specifically enjoining the defendant, or any entity the defendant controlled, from engaging in fraudulent conduct which formed the basis for the offense of conviction. U.S.S.G. § 2F1.1, comment. (backg'd).

Shadduck, 112 F.3d at 529. We concur. Nothing in the guidelines suggests the drafters intended as a general matter to sentence bankruptcy fraud more strictly than other types of fraud. Therefore, we find the enhancement granted here is not appropriate under § 2F1.1(b)(4)(B).[15]

3. Harmless Error

[21] The government contends that if Thayer's sentence was inappropriately enhanced ***229** under § 2F1.1(b)(4)(B), the error was harmless. Thayer's offense level, as calculated by the District Court, was 19. The court departed downward six levels to offense level 13, resulting in a sentencing range of 18-24 months, and sentenced Thayer to the minimum, 18 months. The government's assertion of harmless error is based on *United States v. Vitale*, 159 F.3d 810 (3d Cir. 1998), in which the District Court refused to group the defendant's convictions at sentencing but gave a "substantial" downward departure. We found no error in sentencing but indicated that any error would have been harmless because the defendant "has shown nothing in the record

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[15] Of course, violation of a specific order in a bankruptcy proceeding could constitute a violation of "judicial process" as contemplated in § 2F1.1(b)(4)(B). Like the Court of Appeals for the First Circuit, we do not foreclose the district courts' option to depart upward under U.S.S.G. § 5K2.0 in appropriate cases of bankruptcy fraud, see id. at 530 n. 12.

to support his view that the district court would have departed yet further had grouping been utilized." *Id.* at 815; *see also United States v. Dutcher*, 8 F.3d 11, 12-13 (8th Cir. 1993) (declining to remand after finding the District Court selected an inappropriately high sentencing range because the court departed downward below the proper range and "we are not persuaded that the District Court necessarily would have imposed a lower sentence").

The government contends remand is unnecessary here because Thayer cannot demonstrate the District Court would grant another six-level downward departure to offense level 11, rather than departing downward by four levels and placing Thayer in offense level 13 again. The government also argues Thayer cannot establish his sentence would be reduced on remand even if the District Court were to grant a six-level downward departure, because Thayer's sentencing range at offense level 11 would be 12-18 months, permitting the District Court to re-impose an 18-month sentence.

We are skeptical of the government's interpretation which appears to assign to defendants the burden of rebutting assumptions of harmless error in these kinds of cases. 18 U.S.C. § 3742(f)(1) specifies, "If the Court of Appeals determines that the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case...." In *Williams v. United States*, 503 U.S. 193, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1992), the Supreme Court addressed the possibility of harmless sentencing error in light of this statutory language. The District Court there departed upward based on two factors, one of which the Court of Appeals for the Seventh Circuit

held to be error. The Court of Appeals nevertheless affirmed, finding the remaining ground cited by the District Court was sufficient to justify the departure. The Supreme Court agreed that one of the grounds for the departure was impermissible but remanded to the Court of Appeals for reconsideration of the decision not to remand for re-sentencing, explaining,

> Section 3742(f)(1) does not call for a remand every time a sentencing court might misapply a provision of the Guidelines; rather, remand is required only if the sentence was "imposed as a result of an incorrect application" of the Guidelines .... When a district court has intended to depart from the guideline range, a sentence is imposed "as a result of" a misapplication of the Guidelines if the sentence would have been different but for the district court's error ....
>
> We conclude that the party challenging the sentence on appeal, although it bears the initial burden of showing that the district court relied upon an invalid factor at sentencing, does not have the additional burden of proving that the invalid factor was determinative in the sentencing decision. Rather, once the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed.
>
> If the party defending the sentence persuades the court of appeals that the *230 district court would have imposed the same sentence absent the erroneous factor, then a remand is not required....

Id. at 202-03, 112 S.Ct. 1112 (citations omitted).

In *United States v. Tello*, 9 F.3d 1119 (5th Cir. 1993), the Court of Appeals for the Fifth Circuit held the District Court had erred in failing to reduce the defendant's offense level by one point under § 3E1.1(b) for acceptance of responsibility, causing the court to apply the wrong sentencing range to the defendant. The government argued the sentencing error had been harmless because the sentence the District Court imposed was within both the sentencing range the District Court actually used and the range it should have used. The Court of Appeals held the government had the burden of establishing harmless error under *Williams*:

> The [*Williams*] Court pronounced that the finding of an incorrect application of the Guidelines shifts the burden to the proponent of the sentence -- whether that be the defendant or the government -- to "persuade[ ] the court of appeals that the district court would have imposed the same sentence absent the erroneous factor." ... [W]e appl[y] the Court's Williams standard in determining generally whether a misapplication of the Guidelines automatically requires remand for resentencing.

Id. at 1129 (second alteration in original). Because the government had not met its burden, the court remanded for re-sentencing. *See id.* at 1131.

[22] Under *Williams*, we remand "unless [we] conclude, on the record as a whole, that ... the error did not affect the district court's selection of the sentence imposed[,]" a standard the government cannot meet here. Nor can we agree that Thayer "has shown nothing in the record" supporting the conclusion that the District Court, on remand, would impose a lesser sentence. The District Court explained its downward departure at sentencing:

> Both Thayers were very active in their community. Both Thayers were entrepreneurs trying to generate jobs and economic development in this area .... [T]hey were the victims of incredible bad luck, coupled with some incredible bad judgment in their business operations.
>
> The seriousness of the offense in regards to Mr. Thayer precludes me from imposing a probationary sentence. Personally, I like you Mr. Thayer, but this has just gone too far and is too serious and it[']s hurt the taxpayers too much.

According to the government, the District Court considered 18 months incarceration the proper sentence in Thayer's case and departed downward six levels in order to obtain that sentence. That may be so, but it is not clear from the record. Although the court stated that it would not impose a sentence of probation, it might have believed Thayer's case warranted a six-level departure and then imposed a sentence at the bottom of the range. As has been noted, a sentencing court sometimes will approach the Guidelines with a "tentative view" of the sentence appropriate to the case before it and impose that sentence if permissible under the Guidelines but may also select a sentence based on its position within the range specified by the Guidelines. *See United States v. Bermingham*, 855 F.2d 925, 934-35 (2d Cir. 1988). If Thayer's interpretation of the District Court's explanation for its departure is correct, the court might depart downward by the same six levels on remand and again select the shortest sentence in the resulting range, 12 months incarceration. We cannot determine on appeal which interpretation of the District Court's remarks is accurate, but the record support for the possibility

Thayer would have received a shorter sentence but for the § 2F1.1(b)(4)(B) enhancement is sufficient to require remand. The government did not meet its burden here of demonstrating harmless error.

*231 *IV. Conclusion*

For the reasons given, we will affirm Thayer's convictions but will vacate the judgment of sentence and remand for further proceedings consistent with this opinion.

APPENDIX B

Not Reported in F.Supp.
(Cite as: 1998 WL 195940)

UNITED STATES OF AMERICA

v.

WILLIAM H. THAYER and JOSEPHINE THAYER

Criminal No. 97-184.

United States District Court, E.D. Pennsylvania.
April 9, 1998.

Hope C. Lefeber, Philadelphia, for Josephine Thayer; Gerard P. Egan, Elliott, Reihner, Siedzikowski, North & Egan, P.C ., Blue Bell, for William H. Thayer, Defendants.

Ewald Zittlau, U.S. Attorney's Office, Phila, for U.S.

MEMORANDUM

CAHN, C.J.

*1 Before the court are William H. Thayer's and Josephine Thayer's motions for judgment of acquittal pursuant to Fed.R.Crim.P. 29(c), or, in the alternative, a new trial pursuant to Fed.R.Crim.P. 33. For the reasons that follow, the court will deny the motions.

I.

William H. Thayer and Josephine Thayer were indicted on 37 separate counts. Following an eight-day trial, the jury returned guilty verdicts on some of the counts.

Counts 1 - 21 of the indictment charged the Thayers with willful failure to pay over withholding taxes, in violation of 26 U.S.C. § 7201 [sic, meaning § 7202] and 18 U.S.C. § 2. The jury returned guilty verdicts on Counts 1, 5, 12, 15, 17, 19, and 20.

Counts 22 through 24 charged the Thayers with willful evasion of income taxes, in violation of 26 U.S.C. § 7201 and 18 U.S.C. § 2. The jury returned not guilty verdicts on these three counts.

Counts 25 through 27 charged the Thayers with willfully filing false claims against the government, in violation of 18 U.S.C. §§ 2, 287. The jury returned guilty verdicts on these three counts.

Counts 28 through 37 charged the Thayers with willful concealment of bankruptcy-estate assets, in violation of 18 U.S.C. §§ 2, 152. The jury returned guilty verdicts on all ten of these counts.

The factual background, with inferences drawn in favor of the government, see United States v. Grigsby, 111 F.3d 806, 833 (11th Cir. 1997); Government of the Virgin Islands v. Joseph, 964 F.2d 1380, 1381 (3d Cir. 1992), is as follows. The Thayers were the principal stockholders in Mobile Inmate Systems Corporation ("MIS") and Equipment Leasers of Pennsylvania, Inc. ("ELP"). Mr. Thayer owned 80 percent of the stock in each corporation, and Mrs. Thayer owned the remaining 20 percent. Both Thayers were active in the operations of both corporations. In particular, Mrs. Thayer assumed the responsibilities normally associated with the treasurer and secretary of a corporation.

Both corporations began to experience severe economic difficulties. As the financial problems of the corporations mounted, amounts withheld as federal taxes

from the pay of employees were not paid over to the Internal Revenue Service as required by law. The Thayers did, however, account for the amounts due by filing the requisite quarterly returns. The Thayers did not dispute these facts, and the issue at trial became whether the failure to pay over the withheld amounts was willful.

An important issue in the case involved the ownership of a penthouse condominium in Atlantic City, New Jersey. Counts 22, 23, and 24 charged the Thayers with underreporting their income on their individual joint tax returns for the calendar years 1991, 1992, and 1993. The basis for these three counts was that the corporations were allegedly paying personal expenses of the Thayers, including payments on the Atlantic City condominium and payment of personal credit-card expenses, and that the Thayers were not reporting the value of these benefits on their returns. At trial, the Thayers took the position that the condominium was a corporate asset of ELP, used to further the corporate business, and that any personal use of the condominium was incidental and insubstantial. The jury returned not guilty verdicts on these three counts, apparently concluding that the government failed to prove beyond a reasonable doubt that the condominium was a personal asset of the Thayers. The status of the condominium will be considered further in this opinion because it is related to other counts.

***2** On counts 25 through 27, the jury found the Thayers guilty of willfully filing false claims for refunds from the IRS. Both Thayers received W-2 forms from MIS for the calendar years 1991, 1992, and 1993, showing

that withholding was paid to the IRS on their behalf.[1] The Thayers reported no tax due on their 1040 forms for the calendar years 1991, 1992, and 1993, and requested refunds. The government alleged that the claims for refunds were willfully false because the Thayers knew that the withheld amounts had not been paid over to the IRS. Mr. Thayer did not testify, but Mrs. Thayer testified that she did not expect a refund because she knew the withholding tax had not been paid. The jury rejected her testimony and convicted both Thayers on counts 25-27.

The remaining counts in the indictment, counts 28 through 37, charged the Thayers with willful concealment of bankruptcy estate assets. MIS filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, United States Bankruptcy Court for the Eastern District of Pennsylvania (Docket No. 91-23988-SR). Both of the Thayers continued to direct the operations of MIS during the bankruptcy proceedings because the proceeding was structured with the debtor remaining in possession of the corporate assets. The government alleges that on ten separate occasions, counts 28-37, the Thayers used a check from MIS's corporate bank account at First Lehigh Bank to make installment payments on the Atlantic City condominium. The jury convicted the Thayers on these ten counts of willfully, knowingly, and fraudulently concealing assets from the estate of the bankrupt.

II.

The Thayers now move for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c)

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[1]For the 1993 tax year, the Thayers also received W-2 forms from ELP showing withholdings paid to the IRS.

or, in the alternative, a new trial pursuant to Federal Rule of Criminal Procedure 33.[2] The Thayers recite a litany of alleged errors that they contend, alone or in combination, warrant a judgment of acquittal or a new trial.[3] The court will address these alleged errors seriatim.

(a)

The Thayers contend that the government referred to evidence not in the record during its closing argument. During the cross-examination of Mrs. Thayer, the government introduced credit-card bills that Mrs. Thayer admitted were paid by the corporations owned by the Thayers. These bills contained alleged personal expenses, including two pairs of shoes and some underwear. During its closing, the government stated that it "could have [gone] through each and every credit card [bill but decided instead to] pick[ ] out a couple to ask Mrs. Thayer about," thereby implying that other credit-card bills existed that substantiated the government's claim that the Thayers were receiving unreported income via their corporations. The Thayers urge

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[2] The government argues, at the outset, that the Thayers' motions for judgment of acquittal and for a new trial are untimely. The Thayers requested additional time to file their motions, however, and this court granted their request. See Fed.R.Crim.P. 29, 33.

[3] As the government points out, a motion for judgment of acquittal under Rule 29(c) is properly addressed to the sufficiency of the evidence, not alleged errors in the conduct of the trial. Trial errors may, however, warrant a new trial pursuant to Rule 33.

that the government's reference to matters outside of the record requires post-verdict relief on all counts because the improper reference was probative of willfulness, a critical element in each count. The court concludes that, even if the government's statements were improper,[4] a new trial is not warranted.

*3 First, the fact that the Thayers were acquitted on counts 22, 23, and 24, makes it clear that the jury did not believe beyond a reasonable doubt that the Thayers received substantial unreported income via the corporate credit cards. Second, the court notes that if the jury had found the Thayers' use of their corporate credit cards to be sufficient evidence of a willful intent not to pay taxes, then the Thayers likely would have been convicted on all of the first 21 counts of the indictment. Instead, the Thayers were found guilty on these counts only where their expert witness, a certified public accountant, testified that MIS had a positive bank-account balance. Where this expert testified that no money was available to make the withholding-tax payment, the Thayers were found not guilty. This evidence, then, and not evidence regarding the Thayers' credit cards, appears to have been dispositive on the question of willfulness for counts 1-21.

Third, there was ample evidence to permit a reasonable inference of willfulness for purposes of counts

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[4] The government argues that Mrs. Thayer made both a specific concession that corporate monies were used to pay the identified purchases, and a more general concession that "the corporations paid for the credit card purchases of her and her husband." Because the court concludes that the alleged error does not require a new trial, the court will not address the possibility that the challenged statements were actually consistent with Mrs. Thayer's testimony.

25-37. Unlike counts 1-21, which required the government to prove a willful intent to do a negative act, counts 25-37 involved affirmative conduct on the part of the Thayers. Mrs. Thayer acknowledged that she and Mr. Thayer filed tax returns requesting refunds, even though they had not paid withholding taxes, and she also acknowledged that she wrote checks from MIS's bank account to pay for the Atlantic City condominium. Although the Thayers attempted to provide an innocuous explanation for this conduct, the jury had ample basis, as discussed further infra, to reject the Thayers' position.

Finally, the court believes that it is significant that the government's allegedly improper reference was not to a kind of evidence not admitted at trial, but rather to a quantity of evidence not admitted at trial. There was, as explained, some evidence that the Thayers used corporate monies to pay personal credit-card expenses. Defense counsel argued capably that this evidence was inconsequential because it did not involve a substantial amount of money.

In view of defense counsel's rebuttal, the totality of the evidence against the Thayers, the jury's verdict, the context of the challenged statements, and the lack of other errors affecting the Thayers' right to a fair trial,[5] the court cannot conclude that the government's conduct warrants post-verdict relief.

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[5] Because the court concludes that none of the Thayers' remaining arguments identify trial errors, the court need not consider whether the error committed by the government with regard to the Thayers' credit-card expenses combined with other errors to create such prejudice as to require a new trial.

(b)

The Thayers complain that the government committed reversible error by arguing, in its closing, that the best evidence of willfulness with regard to counts 1-21 was the repeated failure of the Thayers to pay over, on behalf of MIS and ELP, the amounts withheld from employees' wages. The Thayers point out, correctly, that they could not be convicted on counts 1-21 for merely failing to pay over taxes, and that the government was required to prove that their failure was willful. The Thayers claim that the government improperly "boot-strapped" its closing argument by claiming that willfulness could be proved by the Thayers' repeated failures to pay when mere failure to pay is not sufficient. The court rejects the Thayers' argument.

*4 The government's argument regarding the probative value of the Thayers' repeated failures to pay over withholding taxes was not improper. When assessing a mental element such as willfulness, a jury may consider patterns of conduct to determine whether an act is an intentional and willful violation of the law. Direct evidence of a defendant's mental state is rarely available. The fact that an illegal act is repeated may very well be evidence, and may very well be the best evidence, of willfulness. See, e.g., United States v. Bailey, 789 F.Supp. 788, 814 (N.D.Tex. 1992) (concluding that the fact "[t]hat [the defendant] continued paying wages to his employees, year after year, without paying any withholding taxes due to the United States, compels a finding that he willfully failed to pay such taxes and the conclusion that he has violated section 7202").

The jury in this case was charged that willfulness should be the focus of their inquiry on counts 1-21, and

that the mere failure to pay over the withheld taxes is not enough to support a conviction. The jury was also clearly instructed that the burden of proof was on the government, and that the burden never shifted to the Thayers to explain their actions. As explained supra, the jury returned a mixed verdict on counts 1-21, a verdict that both tracks the Thayers' expert witness' testimony and makes it clear that the jury understood that the mere failure to pay was not sufficient to convict.

(c)

The Thayers maintain that the government committed clear error, in regard to counts 25, 26, and 27, by suggesting to the jury that the Thayers' claims for refunds "resulted in a reduction of their overall tax liability." The Thayers argue that this suggestion was error because Mrs. Thayer's unrebutted testimony was that she expected no refund. The court cannot accept this argument. A factfinder is not required to accept a defendant's testimony, even if the testimony is not directly rebutted by the government. See, e.g., United States v. Lambert, 580 F.2d 740, 743-44 (5th Cir. 1978) (explaining that it is for the jury to determine the credibility of a defendant's explanation of his conduct, and stating that "[t]he jury is not bound to accept a defendant's explanation even if it stood uncontradicted by the government.") (citation and internal quotation marks omitted). The government's argument was not a clear error; it was, rather, simply an argument that the Thayers were guilty of the charges. Even if Mrs. Thayer's testimony was unrebutted, the jury was entitled to, and did, reject that testimony.

(d)

The Thayers assert a number of errors in regard to counts 28 through 37, which charged fraudulent concealment of bankruptcy assets. Initially, the Thayers suggest that the government's theories as to counts 22-24 and counts 28-37 are inconsistent, because for purposes of the former counts the government alleged that the Atlantic City condominium was a personal asset, but for purposes of the latter counts the government treated the condominium as a concealed asset of MIS. Relatedly, the Thayers contend that the government caused prejudicial confusion, on the issue of what the alleged concealed assets were for purposes of counts 28-37, by conflating the claim that the concealed assets were the monies diverted from MIS's account to pay the mortgage on the condominium, with the claim that the concealed asset was the condominium itself.

***5** The court does not believe that the government's position on these issues was necessarily inconsistent or prejudicially confusing. The government could, and did, argue both that (1) the condominium was a personal asset, and (2) MIS had concealed assets from creditors while in bankruptcy by diverting corporate monies to make payments on the condominium. These arguments are not inconsistent.[6] Although the government's pursuit of the second argument occasionally tended to suggest

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[6] The Thayers object, for example, to the government's query, "So why is this company [MIS] paying for this condominium if it is not an asset while it's in bankruptcy?" There is nothing improper or unduly confusing about this question. The government alleged that, while in bankruptcy, MIS funds were improperly diverted to pay for the Atlantic City condominium.

that the condominium was itself the concealed asset, and thus an asset of MIS, the government's manifest thrust throughout the trial was that the condominium was a personal asset of the Thayers. Furthermore, although it is true that it was MIS monies, rather than the condominium, that were allegedly concealed, it was critical for the government to establish that the monies were used to support an asset or business purpose that had not been disclosed in bankruptcy proceedings.[7]

The Thayers argued that the condominium was a corporate asset, albeit an asset of ELP. Even accepting that the condominium was an asset of ELP, the jury still could conclude that MIS assets, in the form of monies paid on the condominium mortgage, were concealed. The jury was not required to accept the Thayers' evidence that money in MIS's bank account did not necessarily belong to MIS.[8] It should also be noted that

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[7] In other words, if the condominium had been an asset of MIS, and MIS had revealed as much during bankruptcy proceedings, the payments on the condominium would not likely have been considered an unlawful attempt to conceal assets.

[8] In defense of the ten counts charging willful concealment of bankruptcy estate assets, the Thayers called the former president of their bank to establish that it was he who requested that the Thayers' various business accounts be consolidated in the MIS account. He testified further that the Thayers had consolidated their accounts, and that it followed that the money drawn from the MIS account to pay for the condominium was not necessarily the money of MIS. The Thayers argued that the money used to pay for the condominium was not, in fact, MIS's money, and that the

the jury could have accepted that the Thayers commingled corporate monies in the MIS bank account, and yet still concluded that it was MIS monies that were diverted to pay for the condominium.

Additionally, it is not the case, as the Thayers argue, that the jury's verdict on counts 22-24 establishes that the jury concluded that the condominium was an asset of ELP. First, it is at least possible that the jury rejected both the government's contention that the condominium was a personal asset and the Thayers' contention that the condominium was an asset of ELP; concluding, instead, on the basis of MIS's payments for that condominium, that the condominium was an asset of

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condominium payments could not therefore constitute concealment of bankruptcy assets.

The Thayers now emphasize that the testimony of the bank president was not directly rebutted. They also argue that, if a bankrupt holds only legal title in the nature of an escrow agent or straw party, the asset over which it holds such title is not an asset of the estate, and that such an asset is considered property of the bankrupt estate only if the bankrupt holds equitable title to the asset. The Thayers are correct in the principle of law they enunciate, but it is the facts that determine the outcome. The Thayers were permitted to argue to the jury that it was not MIS assets that were used to pay for the condominium and that the jury should accept the bank president's testimony. The jury declined to do so, and in this factual context had every right to do so.

Finally, the court does not agree with the Thayers' contention that the government's closing argument improperly suggested that any commingling of corporate monies was per se criminal. This is not a fair reading of the government's argument.

MIS. This conclusion would not be inconsistent with the jury's verdict on any count. Second, and more to the point, the jury's verdict on counts 22-24 does not establish that the jury concluded that the condominium was an asset of any entity; rather, the verdict on those counts establishes only that the jury was unable to conclude beyond a reasonable doubt that the condominium was a personal asset of the Thayers.

Finally, the court notes that any confusion at trial with regard to the ownership of the condominium was due in large part to the peculiar way in which title to the condominium was held. Although Mr. Thayer's name appeared on some of the documents pertaining to the condominium, in other respects corporate names appeared which were not explained. This confusion is not a basis for a new trial. It might, however, be a basis for an inference that the Thayers were attempting to conceal assets. While operating MIS under the direction of the Bankruptcy Court, the Thayers caused funds in the bankrupt's checking account to be used to make payments toward the condominium on at least ten occasions. There is, then, certainly a reasonable basis for the factfinder to conclude that the payments from the MIS corporate account were MIS assets.

(e)

*6 The Thayers base a few arguments in support of their post-verdict motions on the testimony of IRS collection agent, Madelon Lankford. Lankford testified that she was involved in collection efforts against both ELP and MIS, before either corporation was in bankruptcy. Lankford testified further that, as part of her collection investigation, she requested that the Thayers provide complete financial information regarding themselves,

ELP, and MIS. Lankford explained that the Thayers never fully complied with these requests, and, in particular, never disclosed the Atlantic City condominium as a personal asset or as an asset of ELP or MIS. The government argued that this nondisclosure was evidence of a guilty mind.

The Thayers argue that Lankford's testimony and the government's argument on this point were improper, irrelevant, confusing, and prejudicial, because neither the Thayers nor the government contended that the condominium belonged to MIS, and thus there was no basis for an inference that the Thayers acted with a guilty mind when they failed to disclose the condominium as an asset of MIS. The Thayers also argue that Lankford's testimony is irrelevant because MIS was not in bankruptcy at the time of Lankford's inquiries.

The Thayers' argument misses the mark. Lankford testified that she investigated the delinquencies of both MIS and ELP, and that the Thayers failed to disclose the condominium as an asset of either corporation. Given that the Thayers claimed the condominium was an asset of ELP, a claim that could have permitted an acquittal on counts 1-24 and counts 28-37 (if the jury also believed that the monies paid from MIS's bank account for the condominium mortgage were not MIS's monies), it was proper for the government to rebut this argument by noting that the Thayers failed to disclose the existence of the condominium during Lankford's investigations. Relatedly, because Lankford's investigations covered both corporations, the Thayers' nondisclosure of the condominium was probative evidence of willfulness on all of the charged counts, regardless of the fact that the nondisclosure predated MIS's bankruptcy.

(f)

The Thayers make a second argument based on Lankford's testimony. Relying on United States v. McLaughlin, 126 F.3d 130 (3d Cir. 1997), the Thayers argue that the government's use of their nondisclosure of the condominium during Lankford's investigation was a violation of their Fifth Amendment privilege against self-incrimination. The government argues that McLaughlin is distinguishable because, unlike the defendant in McLaughlin, the Thayers were not compelled by a summons or subpoena to produce MIS's or ELP's records. The court agrees that this is a critical distinction.

The Fifth Amendment to the United States Constitution states that "no person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. IV [sic] (emphasis added). Thus, a violation of the Fifth Amendment requires an act of governmental compulsion. See Ohio Adult Parole Auth. v. Woodard, No. 96-1769, [523] U.S. [272], 118 S.Ct. 1244, [140] L.Ed.2d [387], 1998 WL 129931, at *9 (1998). In McLaughlin, the court held that the defendant's Fifth Amendment privilege against self-incrimination was violated when the district court permitted the government, over the defendant's pretrial objection, both to show that the defendant had failed to produce certain corporate records in response to a summons from the IRS, and to argue that the nonproduction was "evidence of a guilty mind." 126 F.3d at 134. The court concluded that "[t]he government's repeated reference to [the defendant's] incomplete act of production ... vitiated [the defendant's] Fifth Amendment privilege." Id.

*7 Unlike the defendant in McLaughlin, there is no evidence that the Thayers' nondisclosure of the condominium was compelled in any constitutionally significant manner. There is no evidence that Lankford ever served a summons or a subpoena on the Thayers to request personal or corporate financial records. Thus, the Thayers could have refused, as they effectively did by their conduct, to make complete financial disclosures to Lankford. In this critical sense, then, their disclosures and nondisclosures were voluntary. The government did not, therefore, violate the Thayers' privilege against self-incrimination. See McLaughlin, 126 F.3d at 135 & n.5; id. at 142 & n.2 (Becker, J., concurring).

(g)

Mrs. Thayer makes one final argument related to Lankford's testimony. At the close of the government's evidence, Mrs. Thayer moved for judgment of acquittal on counts 28-37, arguing that there was no evidence that Mrs. Thayer had participated in any of MIS's bankruptcy affairs. Mrs. Thayer recalls that this court denied that motion on the basis of "the government's argument that defendant Josephine Thayer's alleged concealment of the Atlantic City Condominium from Madeline [sic] Lankford ... constituted concealment from a 'creditor.'"[9]

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[9] The court does not agree that this was the basis for its ruling. The court believes, rather, that its ruling was based on the fact that the government had presented sufficient circumstantial evidence to establish that Mrs. Thayer was actively involved in the control and direction of MIS, and that Mrs. Thayer knowingly concealed MIS assets from creditors by writing checks from MIS's bank account to pay for the Atlantic City condominium. In any event, whether this reasoning was

Mrs. Thayer argues that this judgment was wrong, that the court subsequently realized as much, and that, but for the court's erroneous judgment, Mrs. Thayer would have secured judgment of acquittal on these counts and decided not to testify in her defense. Mrs. Thayer concludes that in the absence of her testimony there would have been insufficient evidence to convict her on counts 28-37, and thus post-verdict relief is necessary to cure the court's error.

The court rejects this argument because, notwithstanding any confusion over the significance of Lankford's testimony, the government presented sufficient evidence in its case-in-chief to permit the jury to find Mrs. Thayer guilty on counts 28-37. At the close of the government's case, there was ample circumstantial evidence to permit the jury to conclude that Mrs. Thayer owned and operated MIS in tandem with her husband, that she was aware that MIS was in bankruptcy, and that she was responsible for knowingly concealing MIS monies from creditors. Thus, it is not the case that, but for any alleged error regarding Lankford's testimony, Mrs. Thayer's motion for judgment of acquittal would have been granted.

(h)

At trial, the Thayers suggested that the IRS should have exercised its power to "redeem" certain of the Thayers' real property that had been sold at a foreclosure sale for $100,000 to the senior lienholder, the bank that held a $1.6 million mortgage on the property. The

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clearly expressed is not significant. The reasoning is correct and, thus, was and remains available to justify the court's denial of Mrs. Thayer's motion for judgment of acquittal.

government countered that redemption had not been a viable option. Relying on Delta Savings & Loan Ass'n, Inc. v. IRS, 847 F.2d 248 (5th Cir. 1988), the Thayers argued that the government's position on redemption was legally erroneous and prejudicial. After researching this issue, the court rejected the Thayers' argument. The Thayers now renew their argument and contend that the government's erroneous position on redemption was so prejudicial as to require judgment of acquittal or a new trial. The court again rejects the Thayers' argument, and now makes explicit the basis for its earlier decision on this issue.

*8 During the cross-examination of Lankford, defense counsel addressed the IRS's power to redeem personal property sold at a foreclosure sale. Defense counsel suggested, and Lankford seemed to confirm, that to redeem personal property the IRS is required to pay the purchaser of the property only the price paid at the foreclosure sale. In her direct testimony, Mrs. Thayer maintained that she and her husband had urged the IRS to redeem the subject property. Mrs. Thayer explained that she and her husband believed such a redemption would net the IRS sufficient funds to satisfy the Thayers' outstanding tax liabilities, because the Thayers believed that the IRS could redeem the property by paying only the amount for which the property had been sold at the foreclosure sale ($100,000). Mrs. Thayer suggested that the Thayers' interest in redemption was evidence of non-willfulness, especially in regard to the counts dealing with withheld taxes. Her testimony also suggested that the government had been more interested in prosecuting the Thayers than in receiving the taxes the Thayers owed.

The government deflected this charge, in part, by arguing that redemption had not been a viable option. In support of its position, the government called IRS agent Carlo Gonnella. Gonnella explained that the IRS's lien interest in the subject property was extinguished by the foreclosure sale, but that the IRS had had the right to redeem the property within 120 days of the foreclosure sale.[10] Gonnella explained that, to redeem such a property, the IRS is required to pay the purchaser the "amount legally satisfied" by the sale. In the case of the Thayers' property, Gonnella stated that the IRS would probably have had to pay the purchaser at least the amount of the mortgage ($1.6 million). According to the government, then, it was unlikely that redemption would have yielded proceeds to apply against the Thayers' tax obligations.[11]

28 U.S.C.A. § 2410(d) (West 1994), which determines the amount to be paid for the redemption of real property, see 26 U.S.C. § 7425(d)(2), provides, in critical part, that

> the amount to be paid for such property shall be the sum of--

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[10] Gonnella also noted that the foreclosure sale took place in September, 1993, and that Mr. Thayer did not write to the IRS to request redemption until March, 1996, well after the 120-day period expired.

[11] Gonnella testified to several other impediments to redemption of the subject property, including the fact that Mr. Thayer had filed suit to overturn the foreclosure sale, and the fact that the IRS is required to identify a buyer before redeeming.

(1) the actual amount paid by the purchaser at such sale (which, in the case of a purchaser who is the holder of the lien being foreclosed, shall include the amount of the obligation secured by such lien to the extent satisfied by reason of such sale).

(emphasis added). The extent to which a foreclosure sale satisfies "the obligation secured by such lien" is determined by state law. See Delta Savings & Loan, 847 F.2d at 250; Equity Mortgage Corp. v. Loftus, 504 F.2d 1071, 1075 (4th Cir. 1974).

In Delta Savings & Loan, the IRS held junior tax liens on property owned by two debtors forced into bankruptcy. 847 F.2d at 249. The senior lienholder, Delta, purchased the property in foreclosure for less than the amount owed to Delta. Id. The IRS moved to redeem the property, but offered to pay Delta only the amount, plus interest, that Delta had paid at the foreclosure sale. Id. Delta sued, arguing that the IRS was obligated to pay it the full amount of the debt that had been owed to Delta by the debtors. Id. The court rejected Delta's argument because "a lienholder that has not been fully paid after foreclosing on the property subject to the lien has a right under Louisiana law to pursue the debtor personally for the deficiency." Id. at 250 (emphasis added). In other words, because under controlling state law the amount of the total debt had not been "satisfied by reason of [the foreclosure] sale," the IRS owed Delta only "the actual amount paid by the purchaser." 28 U.S.C. § 2410(d).

*9 Similarly, in Equity Mortgage Corp., Virginia law provided that the purchaser's "lien was satisfied only to the extent of the purchase price ..., less the expenses of

the sale ..., and that [the purchaser] would be entitled to a deficiency judgment against" the debtor. 504 F.2d at 1075. Accordingly, the court reversed the district court's judgment that the government could have redeemed only by paying the purchaser the full amount of the purchaser's lien, and held that the government was required to pay only the amount paid by the purchaser at the foreclosure sale. Id. at 1076.

Pennsylvania law is unlike the state law applied by the courts in Delta Savings & Loan and Equity Mortgage Corp. Under Pennsylvania law, a "creditor's judgment against the debtor is reduced by the fair market value of the property purchased by the creditor rather than the actual sale price of the property." Horbal v. Moxham Nat'l Bank, 548 Pa. 394, 697 A.2d 577, 581-82 (Pa. 1997) (emphasis added). It follows, then, that in the Thayers' case, the IRS could have redeemed the Thayers' property only by paying the fair market value of the property. See Equity Mortgage Corp., 504 F.2d at 1075-76.

In view of the foregoing, the Thayers' belief that the IRS could have redeemed their property by paying the purchaser of the property only $100,000 was erroneous. Gonnella's testimony that the IRS would have had to pay the "amount legally satisfied" was correct, and his estimation that this amount would have been close to the mortgage amount was not clearly erroneous or prejudicial.[12] Mrs. Thayer's testimony that she and her husband

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[12] In their effort to establish that the IRS could have made money by redeeming the Thayers' property, defense counsel suggested that the fair market value of the subject property was much higher than the mortgage debt. Unwittingly, then, defense counsel bolstered the government's argument that redemption was unattractive.

had requested redemption may still have been considered by the jury to be probative on the element of willfulness. Any reliance the jury placed on the government's legally accurate counter-argument, however, is no basis for a judgment of acquittal or a new trial.

(i)

The Thayers argue that, on counts 1-21, the government was required to prove not only willful failure to pay over, but also "failure to truthfully account for" the amount of the withholding.[13] According to the Thayers, because the government admits that the Thayers truthfully accounted for the withholdings by filing quarterly returns, they cannot be convicted on any of these counts. The court rejects the Thayers' argument for the reasons set forth in United States v. Brennick, 908 F.Supp. 1004, 1015-17 (D.Mass. 1995).

(j)

The Thayers argue that the court should reverse their convictions because the government destroyed Madelon Lankford's file, which they believe would have helped them dispel the government's claim of willfulness. It is true that Lankford's files were destroyed pursuant to a regular document-purging program. The jury was advised that the records were destroyed, and the Thayers were permitted to argue that there may have been evidence in those files which would have helped them. The court did not give, although requested by the Thayers, an instruction that an inference should be drawn against the government and in favor of the Thayers on that issue. There was no evidence that the files were

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[13] The Thayers did not raise this objection to the jury instructions at trial.

destroyed in response to this criminal case, or that the IRS destroyed the Thayers' files to disadvantage the Thayers. Thus, spoilation issues which sometimes arise in litigation are not present in this controversy.

(k)

*10 Finally, the Thayers seek acquittal or a new trial on the basis that the verdicts are against the weight of the evidence. As explained throughout this memorandum, and as a review of the trial transcript will confirm, however, the evidence fully supports the verdict.

The Thayers' motions will be denied.

BY THE COURT:

s/Edward N. Cahn
Edward N. Cahn, C.J.

ORDER

AND NOW, this 9 day of April, 1998, upon consideration of: Defendant Josephine Thayer's Motion for Judgment of Acquittal; Defendant William H. Thayer's and Defendant Josephine Thayer's Motion for Acquittal, or, In the Alternative, A New Trial; and the government's responses thereto, it is hereby ORDERED that the Motions are DENIED.

BY THE COURT:

s/Edward N. Cahn
Edward N. Cahn, C.J.

ENTERED: 4/10/98
CLERK OF COURT

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1750

UNITED STATES OF AMERICA

v.

WILLIAM H. THAYER,
Appellant

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge,
SLOVITER, MANSMANN, GREENBERG, SCIRICA,
NYGAARD, ALITO, ROTH, McKEE, RENDELL,
and BARRY, Circuit Judges,
and BROTMAN*, District Judge

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

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* The Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, who sat by designation, as to panel rehearing only.

circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, [sic] is denied.

BY THE COURT,

s/A J Scirica
Circuit Judge

Dated: **08 FEB 2000**